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No. 10-10-731

IN THE
Supreme Court of the United States

DAVID G. WALSH, *et al.*,
Petitioners,

v.

BADGER CATHOLIC, INC.,
formerly known as Roman Catholic Foundation,
UW-MADISON, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, absent evidence of religious animus, a public institution of higher education that has created a limited public forum to promote its educational mission may refuse to fund a student organization's activities that the organization identifies as religious worship, proselytizing, or inculcation of a particular religious belief.

LIST OF PARTIES

Actual parties to the proceedings in the Court of Appeals, as Defendants—Appellants/Cross-Appellees, and Petitioners herein, are: current or former University of Wisconsin System Board of Regents members David G. Walsh, Mark J Bradley, Jeffrey Bartell, Elizabeth Burmaster (former member), Eileen Connolly-Keesler (former member), Judith V. Crain, Mary Quinnette Cuene (former member), Danae Davis, Michael J. Falbo, Thomas Loftus, Milton McPike (former member), Charles Pruitt, Peggy Rosenzweig (former member), Jesus Salas (former member), Brent Smith, and Michael J. Spector, in their individual and official capacities; Kevin P. Reilly, individually and in his official capacity as President of the University of Wisconsin System; John D. Wiley, individually and in his official capacity as then-Chancellor of the University of Wisconsin-Madison; Lori M. Berquam, individually and in her official capacity as Dean of Students at the University of Wisconsin-Madison; Elton J. Crim, Jr., individually and in his official capacity as then-Associate Dean of Students at the University of Wisconsin-Madison; and Yvonne Fangmeyer, individually and in her official capacity as then-Director of the Student Organization Office at the University of Wisconsin-Madison.

Plaintiffs—Appellees/Cross-Appellants below, and Respondents herein, are: Badger Catholic, Incorporated, Elizabeth A. Planton, and Elizabeth A. Czarnecki.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, individual members of the Board of Regents of the University of Wisconsin System (the "Board") and various officials and employees of the University of Wisconsin-Madison, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion of the Seventh Circuit is reported at 620 F.3d 775 (7th Cir. 2010). Appendix ("App.") 1a-29a The District Court Order, dated January 17, 2008, granting the plaintiffs' motion for preliminary injunction is reported at 2008 WL 2766267 (W.D. Wis. Jan. 17, 2008). App. 71a-83a. The District Court Decision and Order, dated September 24, 2008, granting in part and denying in part the plaintiffs' motion for summary judgment, and granting in part and denying in part the Board's motion for summary judgment, is reported at 578 F. Supp. 2d 1121 (W.D. Wis. 2008). App. 30a-70a The District Court Decision and Order, dated December 16, 2008, denying the plaintiffs' motion for reconsideration is reported at 590 F. Supp. 2d 1083 (W.D. Wis. 2008). App. 84a-103a.

JURISDICTION

The Opinion of the Court of Appeals was issued on September 1, 2010. This Court has jurisdiction pursuant to 28 U.S C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 18 of the Wisconsin Constitution provides that no person shall:

> be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent . . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries -

Article X, Section 6 of the Wisconsin Constitution provides:

> Provision shall be made by law for the establishment of a state university at or near the seat of state government . . . and no sectarian instruction shall be allowed in such university.

STATEMENT OF THE CASE

A. Background and Facts

This case concerns an issue that this Court has on several occasions noted was reserved for future consideration—whether a public institution operating a limited public forum is required to fund core religious activities such as religious worship.

This petition arises from the operation of the same student activity fee program at the University of Wisconsin that was at issue in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). Post-*Southworth*, the University of Wisconsin has continued to fund extracurricular activities in a viewpoint neutral manner to promote the University's educational mission. While the University has funded speech from a religious viewpoint, it has declined requests to fund programs that substantially involve religious worship, proselytizing, or the inculcation of a belief in a particular religious faith.[1] App. 37a.

a. Each semester, the University of Wisconsin-Madison ("University") collects student activity fees (called "segregated University fees" or "SUF") from its students on a mandatory basis, with no opt-out provision for objecting students These fees provide a source of funds to ensure that students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political

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[1] As the District Court noted, "[a]s a result of the preliminary injunction [in this case], the University currently funds worship, proselytizing and sectarian instruction" for Badger Catholic App 36a-37a n 5

subjects in their extracurricular campus life outside the lecture hall. Court of Appeals Separate Appendix of Defendants/Appellants ("C.A. Sep. App.") 302, ¶441. Segregated University fees may only be distributed to registered student organizations ("RSOs") and to University departments.

"SUF are state funds which are deposited and held in the State Treasury, and which are subject to the same limitations on use as other state funds." C A. Sep. App. 375, ¶1; *see also* C.A. Sep App. 301, ¶438. A small portion of some of the segregated University fees are deposited into the General Student Services Fund ("GSSF"), which funds the activities of qualified student organizations, including "expressive activities, concerts, some athletic activities, and recreational activities." App. 31a (citations and quotation marks omitted). Distribution of the GSSF is what is at issue in this case.[2]

The University student government ("Associated Students of Madison" or "ASM"), in consultation with the University Chancellor and subject to the final confirmation of the Board, decides how the GSSF will be allocated to support campus student activities. App. 32a; *see also* Wis. Stat. § 36.09(5). The funds are disbursed to student organizations that both (1) satisfy the University's registered student organization criteria, and (2) meet the ASM's eligibility criteria. C.A. Sep. App. 178.

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[2] During the 2007-08 academic year, the GSSF portion of the UW-Madison SUF budget was $2,460,300 C A Sep App 325, ¶ 493

Student Organizations that receive funding from the GSSF do not receive lump-sum payments. C.A. Sep. App. 200, ¶118. Rather, ASM distributes funds to student organizations on a reimbursement or purchase-order basis. C.A. Sep. App. 200, ¶119. Student organizations submit budgets to ASM for preliminary approval but do not receive funds until they submit qualifying receipts and invoices to University staff who are responsible for overseeing GSSF expenditures. C.A. Sep. App. 200, ¶121. The University audits student organizations' reimbursement requests before issuing payment to ensure the expenditures comply with University policies and state and federal law. *Id.*

The Board has promulgated University policies regarding the use of segregated University fees. One of those policies, UW System Policy F50, limits the expenditure of segregated University fees to "items and activities that are related to the mission of the institution and the purpose of the organization" and provides that expenditures of SUF "must also conform with all applicable state and federal laws and policy requirements." C.A. Sep. App 367

Providing guidance on how to apply University policies, the University's Dean of Students directed that segregated University fees would be distributed to requesting registered student organizations to support "educational and expressive activities that are religious in nature." C.A. Sep App. 389. However, they could not "be used to directly support the operating costs of a church or strictly church-related activity (e.g., worship service) if the funds being transferred could be characterized as a donation to the church or as being in lieu of other

contributions to the church normally used to cover similar costs." *Id.* The Dean's guidance specified further that educational activities "may include, but are not limited to, programs which increase students' awareness or understanding of the teachings of a particular faith or about the historical, social, economic, political, cultural or other impact of one or more religions or faiths. Expressive activities provide students the opportunity to communicate their political, religious, moral, or other beliefs, opinions and values." C.A. Sep. App. 394.

b. Respondent Badger Catholic, Inc., is a registered student organization and has received funds from the GSSF since the 2004-05 academic year. App. 33a.[3] For the 2006-07 and 2007-08 academic years, however, the University refused to fund certain specific activities.[4] For example, Badger Catholic sought funding in excess of $253,000 for the 2007-08 academic year. The University agreed to provide funding for more than $218,000 of the request. The University declined the request for the remaining $35,221 based on the nature of the six specific activities for which Badger Catholic sought those additional funds. C.A. Sep. App. 314.

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[3] At the time the lawsuit was filed, Respondent Badger Catholic was known as the Roman Catholic Foundation, UW-Madison, Inc., and "prior to May 1, 2007, was known as the University of Wisconsin Roman Catholic Foundation, Inc." and had other names before that. App. 33a & 33a n. 3.

[4] The four Badger Catholic activities at issue for the 2006-07 academic year were also not funded in 2007-08. For ease of reference, only the 2007-08 activities are discussed in the text.

Badger Catholic described the nature of those activities as involving worship, proselytizing, or the inculcation of a particular religious belief. *See* App. at 35a-36a, 91a-94a (summarizing the activities at issue). "Mentoring for Busy Students," for example, was described as a program in which students met with a spiritual director (Catholic nuns and priests) for spiritual mentoring/counseling and to talk about anything the students wanted for a half-hour. If requested, the nuns and priests would offer guidance or prayer. An advertisement for the program described it this way: "Spend a half hour a day talking to a spiritual director and a half hour a day in prayer." Court of Appeals Supplemental Appendix of Defendants/Appellants ("C.A. Supp. App.") 135. Badger Catholic indicated that proselytizing was one of the intended consequences of the program. C.A. Sep App. 311-12, ¶458. Another program denied funding, an Evangelical Catholic Institute, was a 48-hour program that included two masses, three praise and worship programs, and workshops providing instruction in effective techniques for Catholic proselytizing, creating large and small group Catholic ministries, and implementing evangelical Catholic ministries. C.A. Sep. App. 312-14, ¶460. Badger Catholic confirmed that the Institute was intended to foster worship and proselytizing. C.A. Sep App. 314, ¶461. Badger Catholic also requested funding for Rosary booklets, for students to learn the Rosary prayer, to be used in small groups and by the students individually. C.A. Sep. App. 314, ¶462.[5]

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[5] Reviewing the parties' descriptions of the six challenged

When the University denied Badger Catholic's request for funds for the six activities, Badger Catholic and two of its student members, Elizabeth Planton and Elizabeth Czarnecki, filed suit in the United States District Court for the Western District of Wisconsin against the individual members of the Board and various University employees and officials. They alleged that the University's refusal to fund these six activities amounted to viewpoint discrimination in violation of the First Amendment to the United States Constitution and asserted claims under 42 U.S.C. § 1983.[6]

B. The District Court Decisions

Respondents sought a preliminary injunction, and on January 17, 2008, the District Court (Shabaz, J.) enjoined the University "from enforcing any policy that prohibits or prevents plaintiffs from applying for or obtaining reimbursement for activities listed in plaintiffs' 2007-08 approved budget because the activities are or involve religious speech considered prayer, worship and/or proselytizing." App. 82a-83a.

Respondents subsequently moved for summary judgment. The University opposed the motion and cross-moved for summary judgment. The University argued, in part, that funding for the requested

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activities at issue in this case, the District Court stated that "the undisputed facts are sufficient to demonstrate that [Badger Catholic's] activities included substantial prayer and worship components." App. 91a.

[6] They also alleged various state law claims, which were rejected by both the District Court, App. 67a-69a, and the Court of Appeals, App. 13a-14a, and are not the subject of this petition.

activities was not consistent with the purpose of the limited public forum and that the Establishment Clause of the First Amendment, as interpreted by this Court, prohibited access to the "metaphysical forum" created by limited funding of those activities that Badger Catholic identified as involving worship, proselytizing, or inculcation of a particular religious belief. On September 24, 2008, the District Court (Adelman, J.) entered its decision and order declaring unconstitutional the University's partial denial of funding for the 2006-07 and 2007-08 academic years.

Analogizing to this Court's decisions in *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the District Court reasoned that the University's funding program constituted a "limited public forum" whose restrictions and limitations must be both viewpoint neutral and reasonable in light of the purpose for which the program was created App. 39a-42a.

The District Court held that the University's denial of Badger Catholic's six challenged funding requests was *not* viewpoint discrimination. The court reasoned that the University had instead limited funding based on content because (1) Badger Catholic identified no topic on which the University excluded religious viewpoints but permitted secular viewpoints, and (2) Badger Catholic did not show that the University funded some worship, but not Badger Catholic's, or otherwise regulated Badger Catholic's speech due to its specific viewpoint, perspective, or opinion. App. 55a-57a.

The District Court concluded, however, that the University's denial of Badger Catholic's funding

requests was unreasonable, because (1) funding the activities would not violate the Establishment Clause, and (2) "the University's abstract characterization of the activities as something other than dialogue, discussion or debate simply because they could also be characterized as worship, proselytizing or sectarian religious instruction is an insufficient basis for excluding them from the forum." App. 54a-55a.[7]

C. The Seventh Circuit's Decision

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed. Chief Judge Easterbrook, writing the decision of the court, joined by Judge Evans, commented that "the Supreme Court is not always clear about the difference" between content discrimination and viewpoint discrimination in its First Amendment jurisprudence. App. 7a. The majority concluded that the University violated the First Amendment when it

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[7] In rejecting Badger Catholic's motion for reconsideration of its ruling that the individual members of the Board were entitled to qualified immunity, the District Court reiterated its holding that the "University's policy is better characterized as unreasonable content-based rather than viewpoint discrimination." App. 95a. It noted that "Plaintiffs do not identify any topic concerning which the University excluded a religious viewpoint" and that "[i]n fact, the University funds a considerable amount of [Badger Catholic]'s religious speech—including [Badger Catholic]'s small and large group discussions about religion, educational and service offerings, theater and choral activities, and new-student and freshman welcoming activities—indicating that the University is not attempting to exclude religious or Catholic viewpoints from its forum." App. 95a-96a.

declined to fund all of Badger Catholic's budget requests stating that "the label applied to that discrimination is unimportant." App. 8a

The Seventh Circuit distinguished the present case from this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), noting that while this Court emphasized that the Washington state scholarship program at issue in *Locke* did not evidence hostility to religion, the University "by contrast, does not support programs that include prayer or religious instruction."[8] App. 9a. Finally, the Court of Appeals held that this Court's recent decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), left "no doubt" that "the University's activity fee fund must cover Badger Catholic's six contested programs, if similar programs that espouse a secular perspective are reimbursed." App. 12a.[9]

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[8] As Judge Williams reminded the majority in dissent, this conclusion overlooks that the University provided Badger Catholic substantial funding Indeed, the $218,052 88 provided for the 2007-08 academic year represented 9% of the University's entire GSSF budget App 17a. In addition, the University did not refuse to fund all activities where, for example, a prayer was offered C A Sep App. 191, ¶ 94, 196 ¶¶ 107-108 Rather, as the District Court found, the University denied funding for programs that, based on "the undisputed facts . . included *substantial* prayer and worship components " App 91a (emphasis added)

[9] While the majority stated that the "University promised the Supreme Court in *Southworth* to distribute funds without regard to the content and viewpoint of the students' speech" (App 3a), nothing in *Southworth* requires a university to fund all content without limitation

Central to the majority's reasoning that the University engaged in inappropriate discrimination was its statement that "purely religious activities have 'little meaning on their own' and cannot be meaningfully distinguished from the categories of 'dialog, discussion or debate from a religious perspective' funded by the University." App. 19a (Williams, J., dissenting (quoting majority op. at App. 3a)).

Judge Williams dissented. She noted that the majority "is correct that the University offers funding for training workshops during the school year and summer breaks, but Badger Catholic is also free to access that funding and it has," App. 16a, receiving "the vast majority of the funding it sought in the relevant year," App. 17a. "For example, in the 2007-08 year, Badger Catholic was reimbursed for events titled 'Leadership Training Group' and 'Mary House Overnight.'" App. 16a.

Judge Williams disagreed with the majority's conclusion that "purely religious activities have 'little meaning on their own' and cannot be meaningfully distinguished from the categories of 'dialog, discussion or debate from a religious perspective,'" finding this conclusion to "degrade[ ] religion and the practice of religion." App. 19a. Judge Williams instead reasoned that worship and proselytizing are a separate category of speech rather than viewpoints of speech to which a secular counterpart exists. App. 19a-20a. She therefore concluded that the University was permitted—in a limited public forum like that resulting from allocation of activity funds—to prohibit the use of funds to pay for worship or proselytizing. App. 19a-21a.

As Judge Williams emphasized, the majority's approach inappropriately restricted public universities from drawing any restrictions on student activity funding to pay for purely religious activities:

> Under the panel's view, once a public university has created a forum, there is no way for it to constitutionally limit its forum to anything; it becomes a generally open forum It must now fund the worship activities of every group, which opens the forum to funding requests for the day-to-day activities of those groups who believe day-to-day activities constitute worship. The panel has effectively commanded the University to enlarge its forum to include the worship and other purely religious activities of every student group.

App. 25a.

REASONS FOR GRANTING THE WRIT

This case presents an important question this Court has previously reserved for consideration,[10]

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[10] *See Good News Club v Milford Cent Sch*, 533 U S 98, 112 n 4 (2001) (observing that the challenged "activities do not constitute mere religious worship, divorced from any teaching of moral values"), *Rosenberger v Rector & Visitors*, 515 U S 819, 842 (1995) (clarifying that "[w]e do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity"), *Lamb's Chapel v Center Moriches Union Free Sch Dist*, 508 U S 384, 387-88 n.2 (1993) (noting that appellant church did not raise issue whether it could use public school facilities to conduct religious services)

and over which the circuits are split[11]—whether the First Amendment requires a public institution operating a limited public forum to fund a religious group's worship, proselytizing, or inculcation of a particular religious belief. Scholars and jurists alike have called for this Court's guidance to resolve this important issue.

Lacking clear guidance, public entities, like the University here, have likewise struggled with this question. In receiving and disbursing the funds at issue, the University operates a limited public forum with thousands of participants seeking access to a limited budget. The University must draw reasonable lines and make practical concessions to operate its forum in a way that is consistent with Wisconsin law and furthers its statutory mission while doing so in a viewpoint neutral manner. App. 29a. In administering the funding program consistent with its educational mission, the University has drawn the same type of line between supporting secular programming and supporting pure religious worship that Congress itself has drawn countless times in a myriad of appropriations to secondary education institutions and to religious organizations. *See infra* note 23 at 34-35.

The relevant facts of this case are undisputed, and the University has carefully avoided any excessive entanglement problems by relying on

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[11] *See* App 1a-29a, *Faith Ctr. Church Evangelistic Ministries v Glover*, 480 F 3d 891 (9th Cir 2007) (*"Faith Center"*), *Bronx Household of Faith v Bd of Educ*, 492 F 3d 89 (2d Cir 2007) (*"Bronx Household III"*).

Respondents' self-identification of the challenged activities as worship, proselytizing, or the inculcation of religious belief. Thus, this case presents an ideal vehicle in which to resolve the circuit split on whether a government entity can exclude on a viewpoint neutral basis pure religious worship from a limited public forum and to provide governmental entities much-needed guidance on this important constitutional issue.

I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE A CIRCUIT SPLIT CONCERNING AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

This Court, in *Southworth*, previously recognized that the funding program at issue here creates what is "tantamount to a limited public forum" 529 U.S at 234; *see also id.* at 230 (applying the viewpoint neutrality standard from "the public forum cases"). As noted above, this Court has not addressed whether a governmental entity operating a limited public forum may prohibit use of the forum for religious worship. The Ninth Circuit permits state entities to restrict access to a limited public forum by closing the forum to worship services. The Second Circuit has issued a series of opinions culminating in a fractured, three-opinion order in which the court failed to reach a controlling rationale as to the State's obligation to provide access to limited public forums for the conduct of worship services. The Seventh Circuit below, on the other hand, rejected the University's attempt to draw the same line permitted by the Ninth Circuit, this time in the context of the University's "metaphysical" limited public forum. *Cf. Rosenberger*, 515 U.S. at 830.

A. This Court Has Long Distinguished Between Religious Worship And Speech From A Religious Viewpoint, And Has Left Unresolved The Question Whether The State May Decline To Fund Religious Worship In A Limited Public Forum.

Beginning with *Widmar v. Vincent*, 454 U.S. 263 (1981), through its opinion last term in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), this Court has considered the limitations and obligations of the state in providing access to religious organizations to a limited public forum. Yet the Court has not been confronted with, and has consistently and carefully reserved, answering whether the state must provide a religious organization access to a limited public forum for the purpose of conducting religious worship.

In *Widmar*, the university had a "generally open" policy that allowed non-religious student organizations access to the university's facilities 454 U.S. at 267-68. University policy, however, prohibited access to school meeting rooms to registered student groups wishing to use the facilities for religious worship and discussion. *Id.* at 265. At that time, and treating the "generally open" policy as creating a traditional public forum, this Court applied strict scrutiny *Id.* at 270. The Court held that religious speech is protected by the First Amendment and that the university's policy was a content-based restriction unsupported by a compelling state interest. *Id.* at 276. *Widmar* was therefore silent as to permissibility of prohibiting

access to a limited public forum for an organization seeking to conduct religious worship.[12]

Twelve years later, this Court held in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), that denying a religious group access to New York school facilities after hours to show a religious-oriented film series on family values and childbearing was impermissible viewpoint discrimination. *Id.* at 394. However, *Lamb's Chapel* expressly left open the question whether denying access to the facilities for the conduct of religious worship would be permissible. The Court noted that the issue was not presented because the plaintiff church declined to challenge the school board's denial of the church's request for access to conduct Sunday morning church services. *Id.* at 387-88 n.2.

Similarly, in *Rosenberger*, this Court held that a University of Virginia policy excluding a faith-based newspaper from student activity funding improperly discriminated based on religious viewpoint 515 U.S at 845. The Court differentiated between speech from a "religious perspective" and "a case where, even under a neutral program that includes nonsectarian

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[12] In *Christian Legal Society*, this Court recently explained its decision in *Widmar* by noting that while the Court had recognized that a "university's mission is education . and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities," the university policy at issue in *Widmar* was subject to strict scrutiny because the university had singled out religious organizations for discriminatory treatment 130 S Ct at 2987 (internal quotations omitted)

recipients, the government is making *direct* money payments to an institution or group *that is engaged in religious activity*." *Id.* (emphasis added).

In *Good News Club*, this Court struck down a New York school board policy that prohibited the use of school facilities by a religious organization seeking to hold weekly meetings involving the teaching of morals and character to children through the use of songs, games, and the recitation of Bible stories. 533 U.S. at 109-10 (noting the "only apparent difference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films"). Once again, this Court clarified that it was not confronted with the question now raised in this Petition. The *Good News Club* majority rejected Justice Souter's characterization of the activities at issue as an "evangelical service of worship," explaining that the activities were rather synonymous with those challenged in *Lamb's Chapel* and did "not constitute mere religious worship, divorced from any teaching of moral values." *Id.* at 112 n.4.

In *Christian Legal Society*, this Court reiterated that when the government creates a limited public forum, it may exclude speech where "its distinction is [] reasonable in light of the purpose served by the forum" and so long as the government does not "discriminate against speech on the basis of . . . viewpoint." *Christian Legal Society*, 130 S. Ct. at 2988 (quoting *Rosenberger*, 515 U.S. at 829) (second alteration in original); *see also id.* at 2984 ("Any

access barrier must be reasonable and viewpoint neutral."). The Court emphasized that a public university has the "ability to 'confin[e] a [speech] forum to the limited and legitimate purposes for which it was created.'" *Id.* at 2986 (quoting *Rosenberger*, 515 U.S. at 829). The Court distinguished the restrictions at issue in *Christian Legal Society*, which refused funding to any group not in compliance with the university's non-discrimination policy, from those at issue in *Widmar* and *Rosenberger*. In those cases, the Court held, "student groups had been unconstitutionally singled out because of their points of view." *Id.* at 2988.

B. The Courts Of Appeals Have Reached Conflicting Conclusions Regarding The Ability Of A Governmental Entity To Restrict Access To A Limited Public Forum For Religious Worship.

In the absence of definitive guidance from this Court, the Courts of Appeals have resolved inconsistently the issue of whether limited public forums must be opened to all manner of religious worship. The decision of the Court of Appeals below conflicts with the approach taken by other Courts of Appeals addressing limited public forums and restrictions on funding activities that are substantially worship, proselytizing, or the inculcation of a particular religious belief.

1. The Ninth Circuit Permits A Governmental Entity To Restrict Access To A Limited Public Forum For Religious Worship.

In *Faith Center Church Evangelistic Ministries v. Glover*, the Ninth Circuit held that a state could decline to subsidize religious worship without violating the Constitution. 480 F.3d at 915. The Court considered the constitutionality of a county library policy that opened library meeting rooms for public use, but prohibited the use of such rooms for, among other things, "religious services." *Id.* at 903. The plaintiff, a non-profit religious organization, sought to use the library's meeting rooms to hold meetings to "discuss educational, cultural, and community issues from a religious perspective" and to hold worship services during which its pastor offered a sermon and led participants in prayer. *Id.* The library's staff informed Faith Center that it could not use the library's meeting rooms to conduct religious services. *Id.* at 904.

Faith Center sued the county to enjoin it from excluding the use of the library's meeting rooms for the proposed religious services. The district court granted Faith Center's motion for a preliminary injunction. *Id.* at 904-05.

A divided panel of the Ninth Circuit reversed the grant of preliminary injunction, holding that Faith Center failed to show a likelihood of success on the merits. Consistent with this Court's prior holdings, the Ninth Circuit observed that "[r]estrictions governing access to a limited public forum [like the library rooms] are permitted so long as they are viewpoint neutral and reasonable in light of the

purpose served by the forum." *Id.* at 908 (citing *Rosenberger*, 515 U.S. at 829). The Ninth Circuit further noted that Faith Center's claim largely hinged on whether the county's library policy amounted to viewpoint discrimination, explaining that it "must identify whether the County's exclusion of Faith Center's religious worship services from the Library meeting room is 'content discrimination, which may be permissible if it preserves the purpose of that limited forum, [or] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.'" *Id.* at 911 (quoting *Rosenberger*, 515 U.S. at 829-30).

The Ninth Circuit held that the worship service did not consist of religious viewpoint activities, as it was not "a secular activity that conveys a religious viewpoint on otherwise permissible subject matter." *Id.* at 915. As the Ninth Circuit explained, religious worship is a *category* of speech, rather than simply a *viewpoint* on a particular topic:

> For every other topic of discussion that Faith Center engages in—the Bible, communication, social and political issues, life experiences—religious and non-religious perspectives exist. The same can be said for moral and character development in *Good News Club*, child rearing in *Lamb's Chapel*, and the topic of religion itself in *Rosenberger*.
>
> Religious worship, on the other hand, is not a viewpoint but a category of discussion within which many different religious perspectives abound. If the County had, for example, excluded from its forum religious worship

> services by Mennonites, then we would conclude that the County engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech.

Id. at 915.[13]

The Ninth Circuit also recognized that although the distinction between religious worship and mere speech from a religious viewpoint is a difficult one that the court or the state may not be competent to make, the distinction was made by Faith Center itself, and that the court and the state appropriately relied on this representation in administering the county library policy. *Id.* at 918 ("The County may not be able to identify whether Faith Center has engaged in pure religious worship, but Faith Center can and did.").[14]

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[13] *Cf Bronx Household of Faith v Board of Educ*, 492 F 3d 89, 125 (2d Cir 2007) ("Bronx Household III") (Walker, J, dissenting) ("I also agree that we must be careful not to articulate a standard that would simply require that 'any public school opened for civic meetings . be open for use as a church, synagogue, or mosque'") (quoting *Good News Club*, 533 U S at 139 (Souter, J, dissenting))

[14] As explained above, the University here, similarly relied on Badger Catholic's self-identification of the challenged activities as involving worship, proselytizing, or the inculcation of a particular religious belief App 24a

2. A Second Circuit Has Also Addressed Whether A Public Entity Operating A Limited Public Forum Must Subsidize Religious Worship.

The Second Circuit has also confronted whether the state is obligated to offer access to a limited public forum to groups seeking to conduct religious worship services when the forum has previously been made available to other civic groups.

In *Bronx Household of Faith v. Board of Education* ("Bronx Household III"), the Second Circuit considered an appeal from an injunction enjoining New York City school officials from enforcing a policy that prohibited the use of public school facilities for "holding religious worship services, or otherwise using a school as a house of worship" outside of school hours. 492 F.3d at 90-91, 94. A majority of the Second Circuit's panel voted to vacate the injunction. *Id.* at 91. The panel, however, was unable to reach a consensus opinion on the basis for doing so. Judge Leval voted to vacate the injunction as prematurely granted because the policy had not yet been invoked against Bronx Household. *Id.* at 107. Judges Calabresi and Walker, on the other hand, found the matter ripe for decision, but reached conflicting conclusions on the merits as to whether the city's policy was constitutionally sound.

Judge Calabresi's decision is in accord with the Ninth Circuit's approach in *Faith Center*. In his view, the city's policy was not viewpoint discrimination, but rather a valid content-based restriction because religious worship is a "unique category of protected expression" rather than the

"religious analogue of ceremonies, rituals, and instruction." *Id.* at 92 (Calabresi, J., concurring).

Judge Calabresi contrasted the disputed speech at issue before this Court in *Good News Club*—discussions of character and moral development—with the religious worship services sought to be performed in *Bronx Household III*. Judge Calabresi explained that "'worship' is not a viewpoint on a 'subject matter[,] morals and character,'" and to hold otherwise would "eviscerate the Supreme Court's distinction between *viewpoint* and the subject matter to which that viewpoint or approach is applied." *Id.* at 102 (Calabresi, J., concurring) (citations omitted). He emphasized the admission by the plaintiff's pastor that "significant differences separate the subject of worship services from moral instruction given from a religious viewpoint: 'The Bible study club would not administer the sacraments of baptism and the Lord's supper. That would be a big difference.'" *Id.*

Acknowledging the distinct nature of religious worship, Judge Calabresi explained that: "Prayer and worship services are not religious viewpoints on the subjects addressed in Boy Scouts rituals or in Elks Club ceremonies. Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false." *Id.* at 103. He therefore concluded that the school's exclusion of worship services was viewpoint neutral and a content-based restriction reasonable in light of the purposes of the school's limited public forum. *Id.* at 106.

Judge Walker concluded that the school's policy was viewpoint discriminatory. Notably, Judge Walker agreed with Judge Calabresi that religious

worship should not be deconstructed into component parts and that simply opening a public school for "civic meetings" did not mean that it must be "'open [ ] for use as a church, synagogue, or mosque.'" *Id.* at 108 (Walker, J. dissenting (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)). To Judge Walker, the religious organization's proposed activity fit easily within the purpose for which the school's limited public forum was created, namely to improve relations with the school's surrounding community. *Id.* at 126 (Walker, J., dissenting). In light of this, Judge Walker reasoned that a "more searching scrutiny" of the motives behind the forum limitation was required. *Id.* Based on the lengthy history of litigious animosity between the school board and Bronx Household,[15] Judge Walker concluded that the

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[15] *Bronx Household III* was preceded by two earlier Second Circuit opinions involving application of the school's policies in different circumstances In *Bronx Household of Faith v Community Sch Dist No 10*, 127 F 3d 207 (2d Cir 1997) ("*Bronx Household I*"), the Second Circuit affirmed the dismissal of a suit challenging the application of a New York school board policy that barred outside organizations from conducting "religious services or religious instruction on school premises after school" 127 F 3d at 210 In *Bronx Household of Faith v Board of Educ*, 331 F 3d 342 (2d Cir 2003) ("*Bronx Household II*"), the Second Circuit concluded that the challenged policy was substantially identical to that declared discriminatory by this Court in *Good News Club*, and therefore affirmed the district court's order enjoining the City from enforcing its policy The *Bronx Household II* court pointed out that its ruling was "confined to the district court's finding that the activities plaintiffs have proposed for their Sunday meetings *are not simply religious worship, divorced from any teaching of moral values or other activities permitted in the forum*" *Id* at 354 (emphasis added) The City subsequently modified its policy to

school adopted the policy to exclude a particular viewpoint from its forum. *Id.* at 127 (Walker, J., dissenting).

Even Judge Walker, however, highlighted the need for further guidance on this issue. He stated in his dissent that the question raised by *Bronx Household III*—whether a public school may restrict access to a limited public forum by prohibiting religious worship services on its property—"would benefit from a more conclusive resolution by [the Supreme] Court." *Id.* at 132 (Walker, J., dissenting).

3. The Seventh Circuit Is The Only Court Of Appeals To Prohibit A Public Entity Operating A Limited Public Forum From Excluding Religious Worship.

The primary distinction between the approach of the Seventh Circuit's decision here and the approach adopted by the Ninth Circuit and Judge Calabresi in *Bronx Household III* centers around whether religious worship is simply speech from a religious viewpoint for which secular counterparts abound. *Compare Badger Catholic*, App. 4a (comparing religious worship to counseling programs, explaining "the University cannot exclude those that offer prayer as one means of relieving the anxiety that many students experience") *with Faith Center*, 480 F.3d at

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limit its prohibition only to requests "for the purpose of holding religious worship services, or otherwise using a school as a house of worship," addressed in *Bronx Household III* 492 F 3d at 94 On remand, after *Bronx Household III*, the district court permanently enjoined the enforcement of the New York public school policy and an appeal is pending before the Second Circuit, *Bronx Household v Board of Education*, Case No 07-5291

915 ("Religious worship . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound"); *Bronx Household III*, 492 F.3d at 103 (Calabresi, J., concurring) ("Worship services, moreover, are not in any sense simply the religious analogue of ceremonies and rituals conducted by other associations that are allowed to use school facilities"); *see also id.* at 125 (Walker, J., dissenting) (agreeing court should not view religious worship as expressive activity comprised of several sub-parts, stating that "[b]y deconstructing religious worship into components, the district court denigrates it").[16]

Concluding there was no distinction between worship and the secular speech funded by the University, the majority held that the University could not refuse to fund pure religious worship. App. 10a. In the majority's view, if there is no distinction between religious worship and secular speech about current events, then the University cannot refuse to fund religious worship if it is funding speech by other RSOs. *Id.*

That view cannot be reconciled with the approach adopted by the Ninth Circuit or Judge Calebresi's clear statements that such a distinction does exist.

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[16] Judge Williams asked in her dissent, "[i]f religion, and the practice of one's religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise clause of the First Amendment do? The Free Speech clause, which provides constitutional protection of the right to discuss and debate views, would sufficiently protect the right of people to have 'dialog, discussion or debate from a religious perspective.'" App. 19a-20a (Williams, J., dissenting).

As noted below, the conclusion also is inconsistent with a host of statutes that have, similar to the University policy here, restricted funding for pure religious worship while funding counseling programs or other forms of speech. *See infra* note 23 at 35-36.

In short, the standard announced by the majority in the Seventh Circuit removes any practical discretion that the University has in limiting the scope of its limited public forum and avoiding directly subsidizing religious worship. Far from recognizing the unique role of public universities or providing the discretion this Court has previously called for to permit public universities to determine how best to use their resources to further their secular educational mission, the majority suggests that the University either pay for pure religious worship or decline to fund all summer retreats, training workshops, or counseling sessions. App. 4.

* * *

This split in the federal circuits on this issue, and the fractured opinions authored in each case, highlight the need for clarification from this Court. Indeed, scholars and judges alike have noted the need to address this important Constitutional issue. *See Bronx Household*, 492 F.3d at 132 (Walker, J., dissenting) ("[T]here is no doubt that this particular dispute . . . would benefit from a more conclusive resolution by [the Supreme] Court"); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1269, 1314 (2008) (observing that "the closest question today [involving the Religion Clauses] is whether the government is required to allow worship itself to take place on public premises whenever it opens them to speech by civic organizations" and noting that

"influential circuit court judges have recently split on the issue," "which may draw the attention of the Supreme Court"); John Tyler, cmt., *Is Worship a Unique Subject or a Way of Approaching Many Different Subjects? Two Recent Decisions That Attempt to Answer This Question Set the Second and Ninth Circuits on a Course Toward State Entanglement With Religion*, 59 MERCER L. REV. 1319, 1369 (2008) (observing that *Good News Club* left unanswered the question whether exclusion of worship services from a limited public forum constitutes viewpoint discrimination, and imploring that "the Supreme Court must act now to end this confusion").

II. THIS CASE PRESENTS A GOOD VEHICLE TO REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION.

This Court's review is necessary not only to resolve the circuit split on this issue, but also to provide much-needed guidance to state governments, and in particular to school administrators, grappling with First Amendment questions while balancing the competing interests and demands of their student populations. Left undisturbed, the Seventh Circuit's decision severely limits a school's discretion to draw reasonable lines in light of the purposes of the school's limited public forum and its financial limitations.

A. This Case Raises Important Constitutional Issues Regarding The Ability Of Public Colleges And Universities To Promote Their Educational Missions.

On a number of occasions this Court recognized the need to address serious constitutional issues raised by government decisions relating to the support of religious expression in the context of higher education.[17] That need exists here as well

This Court has acknowledged that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U.S. at 842. It has also held that, even absent evidence of an Establishment Clause violation, a governmental entity may refuse to fund certain types of religious expression. *Locke*, 540 U.S. at 721. That is because, as the Court stated in *Locke*, "there is room for play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause demands. *Id.* at 718 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

a. In *Locke*, the Court upheld a Washington state college scholarship program that barred the use of scholarship monies to pursue a theology degree. 540 U.S. at 715. The State of Washington's "antiestablishment interests," *id.* at 722, reflected in the state's constitution and statutes, was a sufficient

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[17] *See, e g , Rosenberger*, 515 U S at 823, *Locke*, 540 U S. at 715, *Christian Legal Society*, 130 S. Ct at 2978, *cf. Southworth*, 529 U S at 220

basis for refusing funding for "training for religious professions," *id.* at 720.[18]

Wisconsin has a similar antiestablishment provision in its constitution.[19] The Wisconsin constitution also calls for the creation of a public university, but requires that its educational mission be secular in nature. *See* Wis. Const. art. X, § 6 (providing that "no sectarian instruction shall be allowed in [the State's public] university"). As noted above, the University System Policy F50, issued post-*Southworth*, provides that the fees at issue "are state funds which are deposited and held in the State Treasury, and which are subject to the same limitations on use as other state funds." C.A. Sep. App. 375, ¶ 1; *see also* C.A. Sep. App. 301, ¶ 438.

Consistent with these requirements, the University permits the use of the fees in question for

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[18] The Court noted that states since their founding have safeguarded against the compelled subsidization of religious worship. *See, e.g.*, Pa. Const. art. II (1776), reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3082 (F. Thorpe ed. 1909) (reprinted 1993) ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent"), *see also Locke*, 540 U.S. at 723 (quoting same and state constitutions of New Jersey, Delaware, Kentucky, Vermont, Tennessee, and Ohio for same point).

[19] The State of Wisconsin's Constitution provides that no person shall "be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." Wis. Const. art. I, Sec. 18.

extracurricular on-campus activities that promote "the mission of the institution," C.A. Sep. App. 367, but prohibits the use of the funds for activities that are substantially religious worship, proselytizing, or the inculcation of a particular religious belief. App. 94a-95a.

The University's policy falls safely in the "joints" between the two Religion Clauses. As with the Washington statute in *Locke*, the University's policy "imposes neither criminal nor civil sanctions on any type of religious service or rite." *Locke*, 540 U.S. at 720. The University "does not deny" to any religious practitioner "the right to participate in the political affairs of the community," *id.* at 720, nor does the University "require students to choose between their religious beliefs and receiving a government benefit," *id.* at 720-21.[20] In fact, the University funds a significant amount of religious speech and activities.[21] It has simply chosen not to fund religious worship, proselytizing, and inculcation of religious belief, which is inconsistent with the University's mission.

b. The Seventh Circuit denies the University the discretion to determine how best to allocate its funding to support its secular educational mission.

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[20] As with the policy at issue in *Christian Legal Society*, the University "is dangling the carrot of subsidy, not wielding the stick of prohibition." 130 S. Ct. at 2986.

[21] As noted above, Badger Catholic itself receives significant funding, totaling almost $220,000 during the 2007-2008 academic year. During the 2007-08 academic year, the University's entire GSSF budget was $2,460,300. C.A. Sep. App. 325, ¶493.

This Court, however, has consistently emphasized that schools are accorded "a significant measure of authority over the type of officially recognized activities in which their students participate," and thus courts are to approach their consideration of school policies with "special caution" and to accord school officials "decent respect."[22]

In *Christian Legal Society*, the Court stated that its analysis must be viewed in the educational context from which the issue arose. 130 S. Ct. at 2988 ("'First Amendment rights . . . must be analyzed in light of the special characteristics of the school environment'") (quoting *Widmar*, 454 U.S. at 268 n.5). The context is important because deference is owed school authorities in the administration of their policies. *Id.* (cautioning courts to resist "'substituting their own notions of sound educational policy for those of the school authorities which they review'") (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)). Undisturbed, the Seventh Circuit's decision inappropriately infringes on the University's discretion to determine how to expend funds to promote its secular educational mission.

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[22] *Christian Legal Society*, 130 S Ct at 2989 (quoting *Bd of Educ of Westside Cmty Schs v Mergens*, 496 U S 226, 240 (1990), and *Healy v James*, 408 U S 169, 171 (1972)), *see also Rosenberger*, 515 U S at 832 (universities "must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission")

B. This Case Raises Important Constitutional Questions About The Special Status Of Religious Worship.

The Seventh Circuit's holding hinges on its conclusion that worship, proselytizing, and inculcation of a particular religious belief "cannot be meaningfully distinguished from the categories of 'dialog, discussion or debate from a religious perspective' funded by the University." App. 19a (Williams, J. dissenting, quoting Majority Op. at App. 3a).

Some have indicated that any distinction between worship and other forms of religious-based speech is false and unworkable. *See, e.g., Good News Club*, 533 U.S. at 126-27 (Scalia, J., concurring). However, this Court has consistently suggested that there is a constitutional distinction between pure religious worship and speech from a religious viewpoint. *Good News Club*, 533 U.S. at 112 n.4; *Rosenberger*, 515 U.S. at 842; *Lamb's Chapel*, 508 U.S. at 387-88 n.2.

In addition, numerous federal statutes draw a distinction between funding secular speech, including counseling and training programs, and funding religious worship. For example, both the federal executive, *see* Exec. Order No. 13279, 3 C.F.R. § 2(f), p.260 (2002), and legislative branches have included such distinctions in providing funding to religious-based recipients, *see* 42 U.S.C. § 604a(j) ("No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytizing"). There is in fact a long list of federal laws that appear to rely on the very distinction between pure religious

worship and speech from a religious viewpoint that the Seventh Circuit has rejected.[23] *See generally*

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[23] *See, e g*, 20 U S C § 1011k(c) (no funds received as a grant to academic facilities "shall ever be used for religious worship or a sectarian activity or for a school or department of divinity"), 20 U S C § 1062(c)(1) (limiting funds disbursed to colleges and universities by providing that "[n]o grant may be made under this chapter for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"), 20 U S C § 1066c ("No loan may be made under this part for any educational program, activity or service related to sectarian instruction or religious worship"), 20 U S C § 1068e(1) (prohibiting institutional aid disbursed to organizations of higher learning "for a school or department of divinity or any religious worship or sectarian activity"), 20 U S C § 1103e(1) (prohibiting funds disbursed to institutions of higher education "for a school or department of divinity or any religious worship or sectarian activity"), 20 U S C § 6316(e)(9) (funding to state elementary and secondary schools limited so that "[n]othing contained in this subsection shall permit the making of any payment for religious worship or instruction"), 22 U S C § 8303(c)(3)(D) (prohibiting Office of Volunteers for Prosperity from funding any "religious or faith-based organization for the purpose of proselytization, worship, or any other explicitly religious activity"), 25 U S C § 1803(b) (prohibiting disbursing grants to tribally controlled colleges and universities for use "in connection with religious worship or sectarian instruction"), 25 U S C § 1813(e) (prohibiting use of funds for construction of facilities owned or operated by tribally controlled college or university for any construction "used for religious or a sectarian activity or for a school or department of divinity"), 25 U S.C § 2502(b)(2) ("Funds provided [to any tribally controlled school] may not be used in connection with religious worship or sectarian instruction"), 42 U S C § 290kk-2 (limiting funds to religious organizations providing substance abuse counseling services and providing that "[n]o funds provided under a designated program shall be expended for sectarian worship, instruction, or proselyzation"), 42 U S C §

Rosenberger, 515 U.S. at 885 & n.9 (Souter, J., dissenting) (citing federal statutes and stating that Congress "routinely excludes religious activities from general funding programs").

Whether these statutes deal with limited public forums is not significant. The central premise of the Seventh Circuit's decision is that for First Amendment purposes there is no distinction between secular speech and religious worship. Congress, however, has repeatedly recognized there is such a distinction in restricting the use of government funds. This Court has upheld the enforcement of these restrictions and has even construed statutes that lack

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300x-65(i) ("No funds provided through a grant or contract to a religious organization to provide services under any substance abuse program under this subchapter or subchapter III-A of this chapter shall be expended for sectarian worship, instruction, or proselyzation"), 42 U.S.C. § 9920(c) (prohibiting funds disbursed to religious organizations pursuant to Community Services Block Grant Program to be used for "sectarian worship, instruction, or proselyzation"), 42 U.S.C. § 12584(a)(4) (rendering ineligible applications for funding under National Service Trust Program where organization seeks funding for religious instruction, conduct worship services, or construct or operate facilities devoted to religious instruction or worship), 42 U.S.C. § 12584a(a)(7) (providing that national service positions under National Service Trust Program "may not be used for [e]ngaging in religious instruction, conducting worship services or engaging in any form of proselyzation"), 42 U.S.C. § 12634(a) ("[n]o assistance made available under a grant" pursuant to the National and Community Service State Grant Program "shall be used to provide religious instruction, conduct worship services, or engage in any form of proselyzation")

similar restrictions to be so limited in order to ensure compliance with the Establishment Clause.[24]

Given the interest of Wisconsin and many other states in promoting secular education at their state-funded universities, the ability to close limited public forums to religious worship is of national importance. If there is a distinction for First Amendment purposes between "dialog, discussion or debate from a religious perspective" (App. 2a-3a) and actual religious worship—as the Ninth Circuit, Judge Calabresi, the University, and countless others believe—then the Seventh Circuit's decision is unsound and should be reviewed by this Court given the importance of the issues.

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[24] *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 615 (1988) (reversing finding of facial unconstitutionality under Establishment Clause in challenge to federal funding of counseling and educational services relating to adolescent sexuality and pregnancy because there were safeguards to prevent "use by grantees in such a way as to advance religion"); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (addressing federal statute that restricted use of federal grants and loans for construction of "academic facilities" "to be used for sectarian instruction or as a place for religious worship")

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 30, 2010

APPENDIX

APPENDIX A

United States Court of Appeals,
Seventh Circuit.

Nos. 09-1102, 09-1112.

BADGER CATHOLIC, INC., formerly known as ROMAN CATHOLIC FOUNDATION, UW-MADISON, INC., *et al.*, *Plaintiffs-Appellees, Cross-Appellants*,

v.

DAVID G. WALSH, *et al.*, *Defendants-Appellants, Cross-Appellees*.

Argued Oct. 27, 2009.
Decided Sept. 1, 2010.

Before EASTERBROOK, *Chief Judge*, and EVANS and WILLIAMS, *Circuit Judges*.

EASTERBROOK, *Chief Judge*.

The University of Wisconsin at Madison charges every student a fee, which goes into funds for extracurricular activities. The fund dedicated to student services (such as counseling and tutoring) distributes about $2.5 million annually. Many of the recipients use the money to offset the costs of speech: funded organizations include FH King (which promotes sustainable agriculture), the MultiCultural Student Coalition (which promotes "social justice and the principles of unity, integrity, responsibility, and respect"), and Sex Out Loud (which promotes "healthy

sexuality"). When some students objected to paying for other students' speech, the University defended its program as creating a public forum that advances its academic mission using viewpoint-neutral criteria. The Supreme Court accepted this assurance that funds are distributed without regard to the speakers' perspectives and concluded that a neutral, forum-creating program could be funded by a uniform fee collected from each student. *University of Wisconsin v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000).

Among the applicants for funds at the University's Madison campus is a student organization that, when it applied for recognition as a "registered student organization" eligible for money, was known as the University of Wisconsin Roman Catholic Foundation. In 2007 it changed its name to Roman Catholic Foundation, UW-Madison. Last year the group became Badger Catholic. We use the current name, which has the virtue of brevity if not stability. Badger Catholic's application for student-organization status was rejected because its members and officers included some nonstudents, such as a bishop. A reorganization eventually satisfied the University that students are in control, and the University's Chancellor approved Badger Catholic as a registered student organization in 2007. To be eligible for reimbursement, a group must submit a budget for the approval of student government and eventually the administration. Badger Catholic has had trouble with this process. Each budget has been rejected at least in part by the student government, the administration, or both on the ground that much of Badger Catholic's speech is religious in character. The University won't pay for three categories of speech: worship, proselytizing, and religious instruction. It is

willing to use student activity fees for what it calls dialog, discussion, or debate from a religious perspective, but not for anything that it labels worship, proselytizing, or religious instruction.

These categories have little meaning on their own, but examples demonstrate where the University has drawn the line. One of the district court's opinions sets out the six specific programs for which the University has refused to reimburse any of the group's expenses. 590 F.Supp.2d 1083, 1088-89 (W.D. Wis. 2008). One program is called "mentoring for busy students" and entails meetings between students and "one of the spiritual directors for spiritual mentoring/counseling and to talk about anything they wanted for a half-hour. The spiritual directors included Catholic nuns and priests who would offer guidance or prayer if requested by the student." Another program was a summer retreat for leadership training. During the four-day retreat, three masses were said and four communal prayer sessions held.

Although the University promised the Supreme Court in *Southworth* to distribute funds without regard to the content and viewpoint of the students' speech, it has concluded that this promise does not apply to speech that constitutes the practice of religion. In response to Badger Catholic's suit under 42 U.S.C. § 1983, the University (as we call the defendants collectively) contended that funding for prayer, proselytizing, or religious instruction would violate the Establishment Clause of the First Amendment (applied to the states through the Fourteenth Amendment), and that the obligation not to violate the Constitution is a compelling interest that justifies a departure from neutrality. The district court con-

cluded, however, that reimbursing the expenses of religious speakers, through a program equally available to secular speakers, does not violate the Establishment Clause, and that, having established a public forum (which is how *Southworth* treats the student-fee program), the University must not exclude speakers who want to use the forum for worship. 578 F.Supp.2d 1121 (W.D. Wis. 2008), *reconsideration denied*, 590 F.Supp.2d 1083 (W.D. Wis. 2008).

The court entered a declaratory judgment providing that the University must reimburse Badger Catholic's activities on the same basis as it reimburses other student groups. The University is free to decline funding for all summer retreats; if it does not pay for training workshops over the summer for members of FH King, it need not pay for Badger Catholic's retreats either. Likewise, if the University refuses to fund a group such as Sex Out Loud that counsels students to engage in "healthy sexuality" (and distributes contraceptives to reduce the risk), it need not fund a group that counsels from a religious perspective. If the University decides that no student group should receive more than 1% of the fund, or some dollar cap, it could apply that neutral rule to Badger Catholic in common with all other claimants on the limited pot. But having decided that counseling programs are within the scope of the activity fee, the University cannot exclude those that offer prayer as one means of relieving the anxiety that many students experience.

The district court correctly read the Supreme Court's decisions in holding that the University would not violate the Establishment Clause by funding Badger Catholic's programs. Two decisions in

particular—*Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and *Rosenberger v. University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)—support that conclusion.

The University of Missouri at Kansas City allowed student groups to use its facilities, but it withheld permission for a group called Cornerstone, which wanted to use a meeting room for "religious worship and religious discussion." *Widmar*, 454 U.S. at 265, 102 S.Ct. 269. (Cornerstone's normal program included "prayer, hymns, Bible commentary, and discussion of religious views and experiences", *id.* at 265 n. 2, 102 S.Ct. 269.) The University of Missouri contended, just as the University of Wisconsin has done, that any subsidy to worship would violate the Establishment Clause—and it added that providing a rent-free room on campus is a subsidy as surely as the transfer of cash to pay for renting a room off campus. The Justices agreed with the premise that a free room is a form of subsidy but not with the conclusion that a subsidy violates the Establishment Clause. As long as the University makes facilities equally available to secular and sectarian groups, the Court held, there is no constitutional problem. Indeed, *Widmar* added, excluding a religious speaker would amount to content discrimination, which is forbidden in a public forum such as the one the University had established. Cornerstone therefore was entitled to a room where its members could meet, pray, sing hymns, and proselytize.

A decade after *Widmar*, the University of Virginia declined to pay for the expense of printing *Wide Awake*, a religious newspaper that a student group published in an effort to educate and convert other students (in other words, to proselytize). The Univer-

sity of Virginia conceded that this was content discrimination but contended, just as the University of Wisconsin has, that by devoting part of the student-activity fund to religious speech, it would violate the Establishment Clause. Although *Widmar* was seemingly against it, the University of Virginia contended that there is a difference of constitutional magnitude between providing services in kind (such as making meeting rooms available) and handing over cash or reimbursing a religious speaker's expenses. The Supreme Court rejected that effort to distinguish *Widmar*, holding that cash and in-kind subsidies must be treated identically. 515 U.S. at 832-34, 115 S.Ct. 2510. And the Court reiterated *Widmar*'s conclusion that withholding support of religious speech when equivalent secular speech is funded is a form of forbidden viewpoint discrimination. *Id.* at 828-30, 115 S.Ct. 2510.

Decisions since *Rosenberger* reinforce its conclusion that underwriting a religious speaker's costs, as part of a neutral program justified by the program's secular benefits, does not violate the Establishment Clause even if the religious speaker uses some of the money for prayer or sectarian instruction. One good example is *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), which held that states may allow school vouchers to be used at religious schools without violating the Constitution, when the decision about which school to attend reflects a private choice about how best to educate children. Similarly, *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), held that a school would not violate the Establishment Clause by providing facilities to a religious group, which proposed to use them for singing religious songs, praying, and memorizing scripture,

when the facilities were equally available to secular groups—and *Good News Club* added that any departure from neutrality would be viewpoint discrimination that is forbidden in a public forum, which the school district created by allowing private groups to use its facilities. *See also Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (reimbursing the tuition of a theology student does not offend the Establishment Clause, when the scholarship is part of a program that is neutral with respect to religion and the student chooses where to use the scholarship).

These decisions dispose of the University's contention that, in refusing to fund Badger Catholic's proposed activities, it was engaged in content discrimination rather than viewpoint discrimination. Two district judges have handled parts of this litigation. Judge Shabaz called the University's distinction viewpoint discrimination. 2008 WL 2766267, 2008 U.S. Dist. LEXIS 4137 (W.D.Wis. Jan. 17, 2008). After the suit was transferred when Judge Shabaz stopped hearing cases, Judge Adelman called it content discrimination. 578 F.Supp.2d at 1137. Both judges thought the discrimination unconstitutional.

The Supreme Court is not always clear about the difference; in Rosenberger it said that "[v]iewpoint discrimination is [just] an egregious form of content discrimination." 515 U.S. at 829, 115 S.Ct. 2510. Elsewhere it has held that content discrimination can be part of a lawful system of allocating limited funds; this is why a university could decline to pay for any retreats or counseling, if the content of the speech would place it outside the scope of the program. (One example, from *Christian Legal Society v. Martinez*,

___ U.S. ___, 130 S.Ct. 2971, 2998, 177 L.Ed.2d 838 (2010) (Kennedy, J., concurring): A university can decline to pay for an art historian to address a conference devoted to public transit, because the art historian's perspective is outside the scope of the conference.) A university can define the kind of extra-curricular activity that it chooses to promote, reimbursing, say, a student-run series of silent movies and a debate team, while leaving counseling to the student-health service that the university operates itself. But the University of Wisconsin has chosen to pay for student-led counseling, and its decision to exclude counseling that features prayer is forbidden under *Widmar* and its successors. The label applied to that discrimination is unimportant.

Although the University's main theme in the district court was that reimbursement would violate the Establishment Clause, its main theme on appeal is that a public agency is entitled to withhold funds from religious speech, even though not commanded by the Establishment Clause to do so. *Zelman* held that a state is *entitled* to offer school vouchers that can be cashed at sectarian schools but not that it is *required* to do so. Arguments such as Professor (then judge, and now professor again) McConnell's that the Constitution requires a state to follow a principle of neutral funding have not carried the day at the Supreme Court. *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L.Rev. 989 (1991).

One recent illustration of the Justices' willingness to allow states to exclude some religious uses from public expenditures is *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004). A state program of college scholarships had a proviso: the money could

not be used to study for the ministry. The Court held that although the state could have allowed the money to be spent for studies in devotional theology (citing *Witters*), the restriction was compatible with the Free Exercise Clause, because "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at 719, 124 S.Ct. 1307. By choosing not to use public funds to train ministers, the state was making a choice no different from operating a university that includes a department of philosophy but not a department of theology or a seminary. The University of Wisconsin contends that it has made the sort of choice that *Locke* approved.

That's not entirely right, and for two reasons. First, the Court stressed in *Locke* that the state's program did not evince hostility to religion. The scholarships could be used at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits. 540 U.S. at 724-25, 124 S.Ct. 1307. The University of Wisconsin, by contrast, does not support programs that include prayer or religious instruction. Second, and more importantly, the state's decision in *Locke* concerned how to use funds over which it had retained plenary control. Choosing which programs to support and which not, whether by having a department of philosophy but not a seminary, or by granting scholarships to study theology but not prepare for the ministry, is a form of government speech. *See Pleasant Grove v. Summum*, ___ U.S. ___, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009); *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources*, 584 F.3d 719 (7th Cir. 2009). That's why *Locke* declared that public-forum analysis was "simply inapplicable." 540 U.S. at 720

n.3, 124 S.Ct. 1307. But the University of Wisconsin is not propagating its own message; it has created a public forum where the students, not the University, decide what is to be said. And having created a public forum, the University must honor the private choice.

Readers who think that this line is overly formalistic—selective funding as permissible public choice, versus selective funding as impermissible restriction on private choice in a public forum—must recall that the University of Wisconsin itself persuaded the Supreme Court to hold that dissatisfied students are not entitled to get their student-activity fees back, precisely because the fees are used to operate a public forum in which students themselves, and not the University, decide what is to be sa*id*. The Supreme Court gave its imprimatur in *Southworth*, with the proviso that the University must establish neutral rules and not shut out any perspective that is within the program's general definition of extracurricular student activity. Just as there is a big difference between a university as publisher of its own newspaper and as censor of a student paper—the university may choose as publisher what goes into the alumni news but cannot censor a paper or selectively decline to pay where students are the publishers, *see Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (*en banc*)—so a university cannot shape Badger Catholic's message by selectively funding the speech it approves, but not the speech it disapproves. Once it creates a public forum, a university must accept all comers within the forum's scope. This is why, in another decision arising from the University of Wisconsin's fee system, we held that the University is not entitled to exercise a general discretion over which groups can draw on the funds. *See Southworth v. University of Wisconsin*, 307 F.3d 566 (7th Cir.2002).

The University's assurance that it will fund discussion and debate, including discussion with a religious component, because it views discussion and debate as an important part of education, coupled with a declaration that there is just too much devotional activity in Badger Catholic's program, leads us to wonder how the University would deal with an application by a student group comprising members of the Society of Friends. Quakers view communal silence as religious devotion, and a discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does. Now maybe Quakers, Muslims, and Buddhists scorn the University's largesse (as Badger Catholic did until 2003), but a constitutional rule must be general enough to handle all sorts of religion and all choices by student groups.

We deferred action on this appeal while the Supreme Court had *Christian Legal Society* under advisement. It is the latest in the sequence, beginning with *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), and extending through *Widmar*, *Rosenberger*, and *Southworth*, in which colleges or universities set limits on what student organizations they would recognize and fund. *Healy*, which forbade viewpoint discrimination, did not concern religion, so we have not discussed it. All the other cases in this sequence concern student groups that engage in sectarian speech. We wanted to see whether the Court would modify the approach articulated in *Widmar*, Rosenberger, and *Southworth*. The Court left that approach in place and reiterated the norm that universities must make their recognition and funding decisions without regard to the speaker's viewpoint. The Justices divided on the

question whether Hastings College of the Law had satisfied the neutrality requirement, but no Justice disagreed with the propositions that "[a]ny access barrier must be reasonable and viewpoint neutral" (130 S.Ct. at 2984) and that "singl[ing] out religious organizations for disadvantageous treatment" (*id.* at 2987) is permissible only if the requirements of "strict scrutiny" can be satisfied. Christian Legal Society described *Widmar* as a case holding that refusing to allow "religious worship and discussion" in a public forum is forbidden viewpoint discrimination (*ibid.*). There can be no doubt after Christian Legal Society that the University's activity-fee fund must cover Badger Catholic's six contested programs, if similar programs that espouse a secular perspective are reimbursed.

This conclusion disposes of the University's appeal. Badger Catholic has filed a cross-appeal seeking additional relief. It asked the district court for damages and an injunction; the judge awarded only a declaratory judgment. The request for damages founders on the Supreme Court's decision that a state (including a state official sued in an official capacity) is not a "person" for the purpose of § 1983, *see Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), which means that damages from the state treasury are not available under that statute. *See, e.g.*, *Lapides v. University System of Georgia*, 535 U.S. 613, 617-18, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). The University of Wisconsin is part of the state, Wis. Stat. §§ 36.01-36.62; *Southworth*, 529 U.S. at 221, 120 S.Ct. 1346, so damages cannot be awarded under federal law.

Badger Catholic sees two ways around this. One is damages from the defendants in their individual capacities. The district court held, however, that in this capacity the defendants enjoy the benefit of official immunity. Divided decisions such as *Christian Legal Society* and *Locke* show that this corner of the law cannot be regarded as so clear that personal liability is appropriate. "If judges . . . disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). *Accord, Pearson v. Callahan*, __ U.S. ___ , 129 S.Ct. 808, 823, 172 L.Ed.2d 565 (2009).

Badger Catholic's other avenue to damages is state law. After the University declined to reimburse some of its expenses in earlier academic years, the parties reached an agreement under which Badger Catholic's requests would be reconsidered. Badger Catholic contends that the University has not kept its promise, and that it is entitled to compensation for breach of contract. Here its problem is that it did not give the notices required by Wisconsin law. Wis. Stat. § 16.007 (claims against the state), § 893.82(3) (claims against state employees). Badger Catholic concedes that it did not follow the state's procedures but contends that noncompliance should be excused because the state knew what relief it wants. We agree with the district court, however, that Wisconsin does not have a doctrine of constructive compliance; it requires strict performance of all statutory conditions to recovering on a contract with the state. Wis. Stat. § 893.82(2m); *Riccitelli v. Broekhuizen*, 227 Wis.2d 100, 116, 595 N.W.2d 392, 399 (1999) (treating this statute as jurisdictional and therefore not amenable to exceptions or excuses).

As for the choice between declaratory judgment and an injunction: that's a matter left to the district judge's discretion, *see eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006), which was not abused. A declaratory judgment cannot be enforced by contempt proceedings, but it has the same effect as an injunction in fixing the parties' legal entitlements. *See Steffel v. Thompson*, 415 U.S. 452, 466-71, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Badger Catholic fears that the University will attempt to dance around the declaratory judgment, as it has retreated from its assurance to the Supreme Court in *Southworth* that the program is implemented without regard to the speakers' views. A litigant who tries to evade a federal court's judgment—and a declaratory judgment is a real judgment, not just a bit of friendly advice—will come to regret it. The problem with issuing an injunction straight off is that the details required by Fed.R.Civ.P. 65(d)(1)(C) would be considerably more elaborate than the terms of a declaratory judgment. The district judge was not looking for an opportunity to take over management of the University's activity-fee program. If the entry of a regulatory injunction can be avoided by a simpler declaratory judgment, everyone comes out ahead. *See Horne v. Flores*, __ U.S. __ , 129 S.Ct. 2579, 2593-95, 174 L.Ed.2d 406 (2009) (discouraging the use of regulatory injunctions in litigation against parts of state government). If Badger Catholic's fears come to pass, then more relief lies in store. For now, however, a declaratory judgment suffices.

AFFIRMED

WILLIAMS, Circuit Judge, dissenting.

The University of Wisconsin at Madison has created a forum by designating funds with the goal of enhancing the educational and extracurricular experience of its students. The line it has drawn in defining the limits of its forum is viewpoint neutral and constitutionally sound—it neutrally allows each student group equal access to the student fund as long as the group identifies activities that are reasonably within the goals of the limited forum it has created. Because I believe the panel's opinion fails to recognize the University's power to define the purposes and goals of its own forum, I respectfully dissent.

I.

As an initial matter, I believe it is important to set out a brief background on forum analysis and Free Speech, and to be absolutely clear on what the University will and will not fund and where it draws the line. The Constitution does not guarantee an unlimited freedom for private speakers on government property, and sorts government properties into three categories to determine the level of review: traditionally public fora, designated public fora, and limited public fora. *Christian Legal Society v. Martinez*, __ U.S. __ n. 11, 130 S.Ct. 2971, 2983 n. 11, 177 L.Ed.2d 838 (2010); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir.2008). Speakers may only be excluded from a traditionally public forum such as a park or a public street if the exclusion meets strict scrutiny. *Choose Life Ill., Inc.*, 547 F.3d at 864 (citations omitted). Strict scrutiny also applies when a governmental entity creates a "designated public forum" by intentionally opening a nontraditional space for public discourse. *Id.* The third category of fora is the limited public forum, in which the

governmental entity opens property for the use by certain groups or dedicated to the discussion of certain subjects. *Id.* In this limited forum, content discrimination against entire subject matters is permissible when it preserves the purpose of the forum, but viewpoint discrimination is not permitted against speech otherwise within the forum's limits. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). A student activity fee such as the one here undisputedly creates a limited public forum, Christian Legal Society, 130 S.Ct. at 2984, and not a generally open one.

The University's forum funds activities that enhance the students' educational and extracurricular campus experiences. The panel begins by stating that the University must reimburse Badger Catholic's activities on the same basis it reimburses other student groups. And it does, irrespective of the group's religious perspective. The panel is correct that the University offers funding for training workshops during the school year and summer breaks, but Badger Catholic is also free to access that funding and it has. For example, in the 2007-08 year, Badger Catholic was reimbursed for events titled "Leadership Training Group" and "Mary House Overnight." Badger Catholic is also free to access funding that is provided to student groups that offer student counseling. Just as Sex Out Loud could access the forum to counsel students on "health sexuality," Badger Catholic could access the forum for activities that counseled students from a religious perspective. In the 2007-08 year, Badger Catholic was reimbursed for various small groups such as "Breakfast Club," "Catholic Student Union," "New Student Welcome" and "Sunday Night Sexuality."

The University pointedly does not exclude events or activities from the forum because they approach leadership training or counseling from a religious perspective. In fact, Badger Catholic was reimbursed for the vast majority of the funding it sought in the relevant year, an amount of money totaling 9% of the total fund. What the University has not funded are six activities that do not merely involve, but are mostly "worship, proselytizing or prayer" because those activities do not further the forum's goals. Our task is to determine whether this line is both viewpoint neutral and reasonable in light of the forum's purpose of enhancing the students' educational and extracurricular campus experience.

II.

As the panel notes, the Supreme Court recently had the opportunity to revisit and summarize its jurisprudence on the limited public forum in *Christian Legal Society v. Martinez*, __ U.S. __ , 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010). I cannot agree, however, with the panel's conclusion that "there can be no doubt" that Christian Legal Society decides the issue here and believe it is worth taking time to discuss the Court's approach to and application of the limited public forum analysis in a public university setting.

In *Christian Legal Society*, the Court discussed the progression of the law in three cases that define the current limitations on a public university's limited forum. In *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), the Court held that a public educational institution exceeds constitutional bounds when it restricts speech simply because it finds the views expressed by a group to be abhorrent. Then, in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct.

269, 70 L.Ed.2d 440 (1981), the Court relied on *Healy* and held that a university could not single out religious organizations for disadvantageous treatment as compared to the treatment offered to secular groups. In reaching this holding, the Court emphasized that a "university's mission is educational and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar*, 454 U.S. at 268, 102 S.Ct. 269. Finally, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Court held that the school had selected journalistic efforts with religious editorial viewpoints and impermissibly treated them differently than other journalistic efforts. Put concisely, the Court's position after the *Healy*, *Widmar*, and *Rosenberger* line of cases stands for the idea that "a university generally may not withhold benefits from student groups because of their [ ] outlook." *Christian Legal Society*, 130 S.Ct. at 2988. The states retain the right to preserve the property under their control, however, and they can prevent access to a self-created forum, as long as "any access barrier" is "reasonable and viewpoint neutral." *Id.* at 2983.

The panel principally relies on *Widmar*, but it is important to clarify the circumstances in which that case arose. Under an Establishment Clause analysis, *Widmar* held that there is no constitutional problem if a school, with a "generally open" forum, allows a religious group to use a room on a basis open to every other group. *Widmar*, 454 U.S. at 274-75, 102 S.Ct. 269. In *Widmar*, the Court emphasized the University's creation of a "generally open" forum, *id.* at 267-68, 102 S.Ct. 269, and specifically stated that the basis for its decision was "narrow," *id.* at 276, 102

S.Ct. 269. Because it viewed the forum as being akin to a public park, it applied a strict scrutiny analysis in finding that the state's interest was not sufficiently compelling to exclude religious groups where all other student groups had access. *Id.* at 269-70, 102 S.Ct. 269. The *Widmar* Court did refer to the university-created forum as a "limited public forum" in passing, *id.* at 272, 102 S.Ct. 269, but the Court confirmed that it was a case involving restricted access to a public forum in the next year, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 49 n. 9, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Supreme Court's forum analysis has evolved greatly since then, and now, governmental entities can block access to a limited public forum as long as the neutral barrier is viewpoint neutral. *Christian Legal Society*, 130 S.Ct. at 2983.

The panel reaches its conclusion that the University is engaging in viewpoint discrimination by stating that purely religious activities have "little meaning on their own" and cannot be meaningfully distinguished from the categories of "dialog, discussion or debate from a religious perspective" funded by the University. Op. at 777. This conclusion degrades religion and the practice of religion. *See Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 102 (2d Cir.2007) (Calabresi, J , concurring) ("Prayer and worship services are not religious viewpoints on the subjects addressed in Boy Scout Rituals or in Elks Club ceremonies. Worship is adoration, not ritual; and any other characterization of it is both profoundly demeaning and false."). If religion, and the practice of one's religion, can be described as merely dialog or debate from a religious perspective, what work does the Free Exercise clause of the First Amendment do? The Free Speech clause, which

provides constitutional protection of the right to discuss and debate views, would sufficiently protect the right of people to have "dialog, discussion or debate from a religious perspective." That cannot be right, and that religion is not set apart from other forms of dialog or discussion has never been the position of the Supreme Court. *See Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 217-218, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (discussing the importance of the First Amendment's Free Exercise clause); *Everson v. Board of Education*, 330 U.S. 1, 9-13, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (discussing the history of the First Amendment and religious liberty in America).

Moreover, there is no need to get into a theological debate about what worship means and whether there is truly a secular equivalent to worship. The University does not deny money to Badger Catholic for expressing the Catholic version of worship; it denies money to any group to practice its version of worship. If, as Badger Catholic claimed at oral argument, a secular form of worship is possible (for example, a group self-identifies as "worshipping" the Yankees), then the University would have the same neutral basis for declining to fund that specific worship activity. As should be clear by now, I have no argument and agree wholeheartedly with the Supreme Court's understanding and view that religion can be a perspective or lens for discussing permissible topics. *Good News Club*, 533 U.S. at 111, 121 S.Ct. 2093 ("[W]hat matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons.") (emphasis added);

Rosenberger, 515 U.S. at 831, 115 S.Ct. 2510 ("Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subject discussed were otherwise within the approved category of publications.").

The constitutional question, however, is whether the University is disallowing groups to express a particular view on a permissible forum topic or whether it is disallowing groups to express any view on a particular topic. The former is unconstitutional viewpoint discrimination, the latter is constitutionally-permitted content discrimination. And content discrimination is what the University is engaging in here by not funding any worship. The category can be discussed and considered from many standpoints and perspectives, as it always has been. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 723, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Breyer, J., dissenting) (observing that this country boasts more than 55 different religious groups with a significant number of members); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 214, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) ("Today authorities list 83 separate religious bodies. . . ."). The University is not withholding benefits from Badger Catholic because it has a religious perspective. Badger Catholic would only have a claim of viewpoint discrimination if the University was choosing to allocate funding for Presbyterian or Baptist or Jewish religious services but declining to fund Catholic worship services, for example, but that is not the case here.

Of course, excluding purely religious practices as a permissible use in the forum has a disparate impact on religious groups, as they may be the only groups who would wish to use the forum for worship. But, it is a "basic tenet of First Amendment law" that disparate impact does not, in itself, constitute viewpoint discrimination. *Christian Legal Society*, 130 S.Ct. at 2971. And forcing the forum to be open to purely religious activities would have the converse effect of disparately impacting non-religious student groups. As the panel states, this is what the Constitution forbids: "withholding support of religious speech *when equivalent secular speech* is funded is a form of forbidden viewpoint discrimination." Op. at 778 (citing *Rosenberger*, 515 U.S. at 828-30, 115 S.Ct. 2510) (emphasis added). Here, there is no equivalent secular speech funded. To exclude purely religious activities is a categorical, neutral exclusion.

The limited forum here is meant to further the educational and extracurricular experience of students, and the forum is limited by the amount of money in the fund. The University has the discretion to decide that certain activities are worth funding over others, so long as its decision-making criteria is viewpoint neutral. As its funds are limited, it is forced to make these decisions all the time, and generally, these decisions do not take on a constitutional dimension even if one group is denied funding. *Cf. Widmar*, 454 U.S. at 278-79, 102 S.Ct. 269 (Stevens, J., concurring) ("[I]f two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the *First Amendment* would not require that the room be reserved for the group that submitted its application first."). Although a University cannot systematically

deny or discriminate against any group for its views, it can draw lines and make hard decisions about funding. Given the limits and goals of the forum, the University's decision to draw that line at a category such as purely religious activity is not unconstitutional. Our task is merely to decide whether that decision was viewpoint neutral, and it was. As Justice Stevens stated when discussing the registered student organization program at Hastings:

> The RSO forum is no different. It is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals. There are not legal questions but policy questions; they are not for the Court but for the university to make.

Christian Legal Society, 130 S.Ct. at 2998 (Stevens, J., concurring).

The problem, if any, with excluding worship as a category of speech from its forum would lie in how the University and its fund administrators decide which activities constitute "purely religious activity" and which activities use a religious perspective to approach a more generally accessible purpose. *See Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 n. 18 (9th Cir. 2007) (discussing the "specter of inevitable government entanglement" when the county "encounters some future application

who is less than candid" about its reasons for accessing the forum). The University must allow religious student organizations to tackle issues and debates from their religious perspective, and it recognizes the difficulty in trying to decide which activities include prayer and proselytizing and worship and which activities are pure religious practice. But, contrary to the panel's repeated assertion that the University itself has labeled certain activities as off-limits, the University plays no role in labeling activities. Nor has it refused to pay for activities simply because they "feature prayer." Op. at __. It instead asks the student groups to self-identify those activities that are worship, proselytizing, and prayer and then it only declines to fund such activities. There is no dispute here that the only funds Badger Catholic argues it should have received are those it described to the University when it first requested funding as involving worship, proselytizing, and prayer. The University even acknowledges that Badger Catholic could describe Catholic Mass as "Catholic perspectives on the world," and that would probably be funded, because the University does not test or push the group when it self-defines an activity. But, when a group self-identifies an act and elevates it as worship, then the University rightly respects that.

The funding in dispute is not money that is being used to program events for the campus, for the organization's members, or for overhead costs of keeping the group running or recruiting new members. This is money for items self-described as including Mass, the purchase and distribution of rosary booklets, a retreat described as an Evangelical Catholic Institute to train attendees how to evangelize, and private sessions with visiting priests and nuns from Italy.

The self-identification also takes care of a problem that the panel sees with Quakers, Buddhists, and other religions that see no line between religion and daily life. If the campus Quakers put in a request to have their worship reimbursed, the University would decline to fund that request. If on the other hand, the Quakers described their activity as a discussion with the hopes of coming to a consensus (*see* Op. at 780-81), they would have access to the forum. This decision is left to the group, and thus, respects the ability of groups to define and practice their religions. Under the panel's view, once a public university has created a forum, there is no way for it to constitutionally limit its forum to anything; it becomes a generally open forum. It must now fund the worship activities of every group, which opens the forum to funding requests for the day-to-day activities of those groups who believe day-to-day activities constitute worship. The panel has effectively commanded the University to enlarge its forum to include the worship and other purely religious activities of every student group.

My belief that the category of "purely religious activity" is viewpoint neutral is not a call for return to a strict separation between church and state. *See* John Witte, Jr., *That Serpentine Wall of Separation*, 101 Mich. L.Rev. 1869, 1903 (2003) (remarking on the Supreme Court shift from a "wall of separation" between church and state to other principles of religious liberty such as neutrality and accommodations). It instead reflects an understanding that the University has made a choice to limit its forum, in a constitutionally acceptable matter, by not allowing a group access to the fund in a way that is not accessible to every group. The Supreme Court has stated that when access barriers are viewpoint neutral, it is significant that "other available avenues for the

group to exercise its First Amendment rights lessen the burden created by those barriers." *Christian Legal Society*, 130 S.Ct. at 2991. Here, the barrier does not create any barrier for Badger Catholic and other student groups to exercise their First Amendment rights. And contrary to the panel's suggestion that it may not be able to believe the University when it tells us it will fund discussions with religious components, Op. at 780-81, we can, because the University does, and it generously does so. The vast majority of the services and educational opportunities that Badger Catholic, for example, provides are funded by the University, to the tune of some $200,000 per year.

The forum the University has created is viewpoint neutral and reasonable, and that satisfies its constitutional obligations. As Justice Ginsburg pointed out in *Christian Legal Society*, "[o]ur inquiry is shaped by the educational context in which it arises" and judges should "resist substituting their own notions of sound educational policy for those of the school authorities which they review." 130 S.Ct. at 2988 (internal quotations and citations omitted). She continues, "Schools, we have emphasized, enjoy a significant measure of authority over the type of officially recognized activities in which their students participate." *Id.* at 2989. With deference to the school's attempt to distribute limited funds from a student body restless with the continuously increasing tuition and fees, it is reasonable that the school in this case decided that if a group self-identifies activities as worship, the University will not inquire further. It will simply not fund, gift or contribute to that which the group has self-identified as being outside the limits of the public forum the school has created.

III.

The panel also states that the University would not violate the Establishment Clause by funding Badger Catholic's purely religious activities. Op. at 779-80. I agree with the panel that this is true, because a state can choose to create an unlimited public forum, *Pleasant Grove City v. Summum*, __ U.S. __ , 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), and this would pass the well-known test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Generally speaking, a state would not violate the Establishment Clause by opening such a forum because the forum would have the secular purpose of enhancing the educational experience of its students, it would not have the primary effect of advancing or inhibiting religion, and it would not result in excessive government entanglement with religion. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002); *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105. But, this conclusion does not help us decide whether or not the University's limited forum is viewpoint neutral and reasonable. That a state can choose to fund this category of speech does not create an obligation for it to do so. *Locke v. Davey*, 540 U.S. 712, 719, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) ("There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."). The Lemon test is, after all, a test of exclusion—it determines whether a state action violates the Establishment Clause, and holds no position on state inaction.

The Establishment Clause cases referenced by the panel do nothing but support this reading. For example, *Zelman* holds that "states *may* allow school vouchers to be used at religious schools without

violating the Constitution." Op. at 778 (emphasis added). This holding does not have any bearing on the initial question of whether a school district must provide parents with vouchers. It also does not stand for the proposition that a school district which does provide vouchers must allow vouchers to be used at religious schools. Its limited holding states that such a program, with such a choice, does not violate the Establishment Clause. *Zelman*, 536 U.S. at 653, 122 S.Ct. 2460.

Locke v. Davey offers even more support to this reading. 540 U.S. at 719, 124 S.Ct. 1307. *Locke* reaffirmed that the Free Exercise Clause does not impose an affirmative obligation on the state to fund all religious activities of an organization simply because it has chosen to fund activities of its secular counterparts. *Locke*, 540 U.S. at 721, 124 S.Ct. 1307. The panel may criticize the state's decision to engage in this type of selective funding, Op. at 779-80, but it is a permissible constitutional choice. The University had done nothing to block Badger Catholic's or any other group's right to practice its religion. It has chosen instead to take a neutral stance on that core constitutional right, which preserves the purpose of the forum (enhancing educational and extracurricular experiences) without providing additional benefits to those who choose to engage in religious practices as opposed to those who do not.

Though the Establishment Clause might allow the University to fund the activities in dispute if it chose to neutrally fund all such purely religious practices by all groups, it does not require the University to do so merely because it has created a forum. And, choosing to have created a forum for the purpose of enhancing students' educational experience should not obligate the University to directly fund religious

institutions. The University maintains the power and discretion to control the purposes and goals of its fund and to designate the class of speech that is within the forum. The broad category of purely religious practices, with the endless number of perspectives with which to view that category, is a viewpoint neutral access barrier, and to find otherwise would be to hold that universities have no power to limit their forums to further the forum's goals and purposes.

IV.

The University has acknowledged how difficult it has been to delineate a line between funding all activities and making sure to be viewpoint neutral. I commend its efforts and believe the line it has drawn is a constitutional one. It has drawn this line with an eye to its state constitution and its educational mission. Our review should only be of whether that line creates a neutral barrier or if it discriminates based on viewpoint. Purely religious practices, as self-defined by the student group, is certainly a viewpoint neutral, category of speech. To fund every group's varying approaches to their core religious practices would burden the forum and its purposes to the point of making it impossible to administer. Excluding this category of speech from the forum is a neutral barrier as it restricts Badger Catholic's ability to access the forum on the same basis as it restricts the ability of other religious and nonreligious student groups, such as Sex Out Loud, Jewish Cultural Collective, and MultiCultural Student Coalition to use the forum. The University has created a neutral barrier in precluding the use of its limited forum for purely religious practice. This neutral barrier is reasonable in light of the forum's educational mission, and it, in my view, is constitutional.

APPENDIX B

United States District Court,
W.D. Wisconsin.

No. 07-C-0505.

ROMAN CATHOLIC FOUNDATION, UW-MADISON, INC., *et al.*,
Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DAVID G. WALSH, *et al.*,
Defendants.

Sept. 24, 2008.

DECISION AND ORDER

LYNN ADELMAN, *District Judge*.

Plaintiff Roman Catholic Foundation, UW-Madison, Inc. ("RCF") and two of its student members, Elizabeth A. Planton and Elizabeth A. Czarnecki, bring this action against the Regents of the University of Wisconsin and various University officials under 42 U.S.C. § 1983. Plaintiffs challenge the constitutionality of the University's refusal to fund certain activities out of the University of Wisconsin-Madison's segregated fee account, which funds a variety of student activities. Plaintiffs argue that the University's refusal to fund activities involving "worship," "proselytizing"

or "sectarian religious instruction"[1] constitutes viewpoint discrimination in violation of the First Amendment. The University contends that the First Amendment's Establishment Clause required it to refuse to fund such activities. In January 2008, Judge Shabaz preliminarily enjoined the University "from enforcing any policy that prohibits or prevents plaintiffs from applying for or obtaining reimbursement for activities listed in plaintiffs' 2007-08 approved budget because the activities are or involve religious speech considered prayer, worship and/or proselytizing." (Dkt. # 50 at 12.) The parties now cross move for summary judgment.[2]

I. BACKGROUND

A. The Segregated Fee System

Each semester, the University of Wisconsin-Madison collects approximately $400.00 from each full-time student and allocates it to segregated fees, which support a variety of non-instructional student services, programs and facilities related to the University of Wisconsin's overall educational mission. The University deposits some of these fees—about $33.00 per student per semester—into the General Student Services Fund ("GSSF"), which funds the activities of qualified student organizations, including "expressive activities, concerts, some athletic activities, and recreational activities." (Proposed Finding of Fact [hereinafter

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[1] The University uses the phrases "sectarian religious instruction" and "inculcation on of belief in a particular religious faith" interchangeably. I will use the former phrase.

[2] The case was reassigned from Judge Shabaz to Chief Judge Crabb, who subsequently recused herself The case was then randomly assigned to me as a designated judge for the Western District of Wisconsin

"PFOF"] ¶ 440.) The purpose of the GSSF is "to provide a source of funds to ensure that students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." (PFOF ¶ 441.)

In order to obtain funds from the GSSF, a student organization must be a "registered student organization" ("RSO") and meet additional criteria ("GSSF eligibility criteria"). The Associated Students of Madison ("ASM"), the student government, bears primary responsibility for establishing such criteria. University administrators, including the Chancellor, are also involved, although the parties dispute to what extent. The ASM's finance committee, the Student Services Finance Committee ("SSFC"), plays a major role in allocating GSSF funds among eligible RSO's. Student organizations submit proposed budgets to the SSFC, which makes recommendations to the ASM, which in turn makes recommendations to the Chancellor, who makes recommendations to the Regents. After a student organization incurs an approved expense, it either submits the invoice to the GSSF or pays it and seeks reimbursement. The University does not dispense cash directly to any student organization.

In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), several students challenged the segregated fee system under the First Amendment. They argued that the system unconstitutionally compelled speech because it required them to fund expression with which they disagreed. The Supreme Court rejected their claim, reasoning that "[t]he First Amendment permits a public university to charge its

students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral." *Id.* at 221, 120 S.Ct. 1346. On remand, the lower courts explored the requirement of viewpoint neutrality as it relates to segregated fees. *See, e.g., Southworth v. Bd. of Regents of the Univ. of Wis. Sys.* ("*Southworth II*"), 307 F.3d 566 (7th Cir.2002).

B. Plaintiffs' Funding Requests

Plaintiff RCF is a non-profit corporation which, prior to May 1, 2007, was known as the University of Wisconsin Roman Catholic Foundation, Inc. ("UWRCF").[3] RCF's purpose is to "promote the religious, charitable, and educational interests of Roman Catholic and non-Roman Catholic students, faculty, and staff at UW-Madison." (PFOF ¶ 5.) Prior to 2003, RCF had not sought funding from the University's pool of segregated fees. In 2003, however, UWRCF applied for GSSF funds for the 2004-05 academic year. The University questioned its eligibility but eventually approved a portion of its requested budget. In 2004, UWRCF applied for GSSF funds for the 2005-06 academic year. Administrators again questioned its eligibility. Eventually, however, the University approved about sixty percent of UWRCF's 2005-06 budget request.

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[3] The University contends that RCF "did not exist until May 1, 2007" (*e.g.*, Resp. to PFOF ¶ 3), but this assertion is incorrect Although it has had many different names, RCF has existed since 1907. *See* http://www wdfi org/apps/ Corp Search/ Search aspx? (enter "Roman Catholic Foundation" into search field and then click first result) (last visited Sept 19, 2008) However, prior to May 1, 2007, RCF was a significantly different organization and operated under a different name

In 2005, UWRCF applied for GSSF funds for the 2006-07 academic year. Administrators reiterated their concerns about eligibility, and the Chancellor questioned whether UWRCF had qualified as an RSO. Ultimately, the University approved UWRCF's 2006-07 budget, although the Chancellor cautioned that in the future, UWRCF would have to become an RSO before it could receive further GSSF funding.

In 2006, UWRCF applied for GSSF funds for the 2007-08 academic year and for RSO status. The University denied the latter request for two reasons. First, contrary to established criteria, UW-Madison students did not control UWRCF; the St. Paul's Catholic Center and various religious officials including a pastor and a bishop did.[4] Second, contrary to the University's policy against religious discrimination by RSOs, UWRCF restricted its membership to Roman Catholics. In response, UWRCF sued the University, seeking to enjoin enforcement of the RSO eligibility criteria. Judge Shabaz preliminarily enjoined the non-discrimination policy but not the requirement that RSOs be student-run. On May 2, 2007, the parties settled. UWRCF agreed to change its name to RCF and to submit to student control. The University agreed to recognize RCF as an RSO and to allow it to obtain GSSF funding. However, RCF agreed not to seek funding for "masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy." (PFOF ¶ 178.) The University also agreed to approve RCF's 2007-08 budget request.

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[4] RCF disputes that students did not control UWRCF. However, I need not discuss the issue since, as will be discussed, the University ultimately granted RCF RSO status.

In June 2007, however, the University concluded that it could not properly reimburse RCF for four of its 2006-07 budget expenditures because they supported activities that constituted worship, proselytizing, or sectarian religious instruction. The University believed that if it paid for such activities with state funds, it would violate the Establishment Clause. The disputed expenditures for 2006-07 involved:

(1) The Mentoring for Busy Students program, which the parties describe as follows (although they dispute some of the details):

> [S]tudents participating in the [Mentoring for Busy Students program] met with one of the spiritual directors for spiritual mentoring/ counseling and to talk about anything they wanted for a half-hour. The spiritual directors included Catholic nuns and priests who would offer guidance or prayer if requested by the student.

(PFOF ¶ 457).

(2) The Evangelical Catholic Institute, which the University describes as "a primary training institute for [RCF's] leaders to learn from a Catholic perspective how to talk to people about prayer, worship, and the Catholic faith." (PFOF ¶ 460.) The Institute's agenda included a variety of activities, including masses, prayer, and worship sessions. RCF states that although the funding would have supported the Institute, it would not have directly paid for the masses and worship sessions. Besides the mass and worship sessions, the Institute included speakers that discussed Christian faith and belief.

(3) A drum shield, a device that helps control the sound of a set of drums, which RCF's praise and

worship band uses at its Alpha-Omega programs, which help "undergrads explore their faith." *See* http://www.stpaulscc.org/ao.php (last visited Sept. 23, 2008); (*see also* PFOF ¶ 456).

(4) Printing costs for Rosary instructional pamphlets (PFOF ¶ 453), which assist "students in learning more about the Rosary prayer itself as well as how to pray the Rosary." (PFOF ¶ 462).

The University generally approved RCF's 2007-08 budget but continued to deny funding for activities that it considered worship, proselytizing or sectarian religious instruction. The disputed 2007-08 expenditures included those disputed in 2006-07 and also the Evangelical Summer Training Camp, which the University describes as "essentially a retreat that serves as training for the organization's leaders . . . [T]he daily schedule . . . included three masses and four communal prayer and worship programs." (PFOF ¶ 455.) RCF states that the expenditures paid for students to attend the entire program and did not directly support the prayer and worship elements. The final disputed 2007-08 budget item was an expenditure for the Samuel Group program, which involved RCF's bringing nuns from Italy to Madison to meet with RCF students "in an effort to help students look more closely at their path in the world," including helping students choose a major and to determine whether they were "meant to be a priest, or religious, or to be married." (PFOF ¶ 459.)

Although the University declined to fund the above activities,[5] it funds many other RCF activities,

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[5] As a result of the preliminary injunction, the University currently funds worship, proselytizing and sectarian instruction by RCF, including the activities discussed above. The University

including large and small group discussions, educational and service offerings, theater and choral activities, and student orientation and welcoming activities. (PFOF ¶ 465.) The University has drawn a line between activities that constitute worship, proselytizing and sectarian religious instruction and those that constitute "dialog, discussion or debate" from a religious perspective. (Defs.' Br. in Opp'n at 14.)

C. GSSF Eligibility Criteria

In addition to challenging University funding decisions, RCF contends that one component of the University's GSSF eligibility criteria-so-called "Criterion C"—is unconstitutionally vague. To ascertain whether it is GSSF—eligible, an RSO first applies at the student government level and ultimately works its way up to the Chancellor, who has the final say. In 2007, the student government determined that RCF would not be eligible for GSSF funding for the 2008-09 academic year because it did not satisfy Criterion C. In its original form, Criterion C stated that:

> (C) The organization/program must provide a specific and identifiable educational benefit and service to the students of the University. This benefit or service may include event programming and/or leadership development opportunities, but must also have significant additional components.

(PFOF ¶ 264.) During the eligibility review process, members of the SSFC confessed confusion about Criterion C's meaning and denied RCF GSSF eligibility.

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has not paid for activities that occurred in 2006-07 and 2007-08, those activities took place before Judge Shabaz entered the preliminary injunction.

Although the Student Judiciary, another branch of student government, attempted to clarify Criterion C, it seemed only to add to the confusion. In December 2007, the SSFC revised Criterion C so that it provided:

> The group must provide to the students of the University a specific and identifiable educational service, which must include significant components beyond event programming and leadership development opportunities. (Though not necessary, event programming and/or leadership development opportunities may be present, but alone do not constitute an educational service.)

(PFOF ¶ 396.) In February 2008, the SSFC reconsidered RCF's eligibility under the revised Criterion C and again found RFC ineligible. RCF appealed to the Student Judiciary, which upheld the decision. However, RCF then appealed to the Chancellor, who found it eligible for funding and noted that neither version of Criterion C was very clear and that Criterion C would not be applied in future years.

II. DISCUSSION

I may grant summary judgment only when the materials before me demonstrate "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Miller v. American Airlines, Inc.*, 525 F.3d 520, 523 (7th Cir.2008).

A. Plaintiffs' Free Speech Claims

1. Applicable Principles

In *Southworth* and an earlier decision, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Supreme Court set the parameters for plaintiffs' Free

Speech claims. In *Southworth*, the Court held that its "public forum" cases governed whether a university could compel students to pay segregated fees that would fund expression which they opposed. 529 U.S. at 229-30, 120 S.Ct. 1346. The Court reasoned that although the University's segregated fee system was "not a public forum in the traditional sense of the term," the University had created a nonphysical forum involving financial support for speech. *Id.* at 230, 120 S.Ct. 1346. The Court also recognized that the system contained "high potential for intrusion on the First Amendment rights of the objecting students" because "it is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs." *Id.* at 232, 120 S.Ct. 1346. The Court held, however, that

> [t]he University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to sustain an open dialogue to these ends.

Id. at 233, 120 S.Ct. 1346.

The Court added that the First Amendment placed some limits on the segregated fee system and that "the principal standard of [First Amendment] protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support." *Id.* In elaborating on such requirement, the Court relied on *Rosenberger*, discussed in more detail below, in which it held that student fees used to construct a "metaphysical" public forum must be

distributed on a viewpoint neutral basis. *Rosenberger*, 515 U.S. at 830, 115 S.Ct. 2510. In *Southworth*, the Court summarized the combined effect of its *Southworth* and *Rosenberger* holdings: "Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for insuring the integrity of the program's operation once the funds have been collected," *Southworth*, 529 U.S. at 233, 120 S.Ct. 1346, concluding that "the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle." *Id.* at 233-34, 120 S.Ct. 1346.

In *Southworth*, the parties stipulated that the University's segregated fee system was viewpoint neutral.[6] In *Rosenberger*, however, which involved the University of Virginia's policy of paying the printing costs of a variety of student publications, viewpoint neutrality was the central issue. 515 U.S. at 822, 115 S.Ct. 2510. The University of Virginia financed its policy in a manner similar to the University of Wisconsin's segregated fee system. *See id.* at 823-28, 115 S.Ct. 2510. The University of Virginia refused to fund the printing costs of a religious student journal, however, because the publication "'primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 823, 115 S.Ct. 2510. The *Rosenberger* plaintiffs alleged that this was viewpoint discrimination. As in *Southworth*, the Court evaluated the plaintiffs' claims under its public forum cases, recognizing that a student fee system "is a forum more in a metaphysical than in a spatial or geographic sense, but the same [public

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[6] Viewpoint neutrality became an issue on remand. *See Southworth II*, 307 F 3d at 568

forum] principles are applicable." *Id.* at 830, 115 S.Ct. 2510. The Court then analyzed the plaintiffs' claims under the level of scrutiny applicable to limited public forums.[7]

In a limited public forum, "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Id.* at 829, 115 S.Ct. 2510 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Once it has opened a limited public forum, however, "[t]he State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Id.* Nor may the state "discriminate against speech on the basis of its viewpoint." *Id.* Thus,

> in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, [the Court has] observed a distinction between, on the one hand, content discrimination,

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[7] The Supreme Court's public forum cases deal with a range of forums, from "traditional public forums" to "nonpublic forums," and the level of scrutiny applicable to the government's actions in each type of forum varies *See, e g , Christian Legal Soc'y v Walker*, 453 F 3d 853, 865-66 (7th Cir 2006) In the present case, however, I need not discuss this body of law comprehensively. Rather, I will focus on the "limited public forum," the type of forum at issue in *Southworth* and *Rosenberger* I note, however, that neither *Southworth* nor *Rosenberger* prevents a university from opening a metaphysical forum that is not a limited public forum

> which may be permissible if it preserves the purposes of that limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 829-30, 115 S.Ct. 2510. The Court ultimately concluded that the University of Virginia's decision to pay the printing costs of secular student newspapers but not student newspapers with a religious perspective constituted viewpoint discrimination. *Id.* at 837, 115 S.Ct. 2510. It then addressed whether the University of Virginia's interest in not violating the Establishment Clause justified such discrimination, a topic I discuss in more detail in the next section.

In summary, the Supreme Court's cases establish that: (1) when a public university uses mandatory student fees to create a metaphysical forum, it must satisfy the requirements set forth in the Court's public forum cases; (2) usually (but not necessarily), a metaphysical forum will be evaluated under the level of scrutiny applicable to limited public forums; (3) the funds collected through a system of segregated fees that establish a limited public forum must be distributed on a viewpoint neutral basis; and (4) any content-based distinctions in a metaphysical, limited public forum must be reasonable in light of the purposes of the forum.

2. Establishment Clause

Because the University relies so heavily on the Establishment Clause, I will discuss it before applying the public forum principles discussed above. The University maintains that it cannot fund worship, proselytizing or sectarian religious instruction out of segregated fees without unconstitutionally supporting

religion. However, a state does not violate the Establishment Clause by affording religion the same access to a public forum that it grants to non-religious groups. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-19, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); *Rosenberger*, 515 U.S. at 837-46, 115 S.Ct. 2510; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-63, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-97, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar v. Vincent*, 454 U.S. 263, 270-276, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). Although the Supreme Court's Establishment Clause jurisprudence is not always clear, in the public forum context, the Court has focused on governmental neutrality. *Good News Club*, 533 U.S. at 114, 121 S.Ct. 2093; *Rosenberger*, 515 U.S. at 839, 115 S.Ct. 2510. Further, it has held that "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'" *Good News Club*, 533 U.S. at 114, 121 S.Ct. 2093 (quoting Rosenberger, 515 U.S. at 839, 115 S.Ct. 2510).

"More than once" the Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839, 115 S.Ct. 2510. This is so even when the religious speakers seek to use the forum "for sectarian activities, accompanied by some devotional exercises." *Id.* at 842, 115 S.Ct. 2510. Indeed, in *Widmar*, the Court held that the Establishment Clause did not allow the government to

prohibit a student group from using a public forum "for religious worship and religious discussion," including "prayer, hymns, Bible commentary, and discussion of religious views and experiences." 454 U.S. at 265 & n. 2, 102 S.Ct. 269. Thus, in the present case, the University may grant religious student groups access to its segregated fee forum on the same basis as non-religious student groups, even if some of the groups' activities could be characterized as worship, proselytizing or sectarian religious instruction.

The University makes two arguments in support of the proposition that the Establishment Clause compels it to withhold segregated fee funding for worship, proselytizing, and sectarian instruction. First, it contends that the Court has drawn a line between religious speech and religious expression amounting to worship, proselytizing and sectarian instruction, and that it allows only the former in a public forum. However, this argument relies principally on dissenting opinions in the cases cited above. As discussed, the controlling opinions hold that the government does not violate the Establishment Clause when it grants religious groups equal access to a public forum, even when the religious activity could be described as worship. *See, e.g., Widmar*, 454 U.S. at 265 & n. 2, 102 S.Ct. 269.

On this point, I note also that it is sometimes difficult to distinguish between speech from a religious viewpoint and worship, proselytizing or sectarian instruction. Religious speech sometimes proselytizes, and elements of worship sometimes pervade religious discussions. "There is 'no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible,'" and thus the Court "has found no single mechanical

formula that can accurately draw the line in every case." *Van Orden v. Perry*, 545 U.S. 677, 698-99, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (Breyer, J., concurring) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (concurring opinion)). Justice Breyer's comment concerned formulating a test governing Establishment Clause cases, but it applies equally to the University's attempt to draw a line between permissible and impermissible religious speech. Likewise, the Supreme Court has explained that the Establishment Clause does not require governmental officials to "scrutinize the content of student speech, lest the expression in question . . . contain too great a religious content." *Rosenberger*, 515 U.S. at 844, 115 S.Ct. 2510. As discussed in more detail in the next section, instead of attempting to draw lines at a relatively high level of generality, the University should focus on evaluating every proposed use of segregated fees individually in light of the purposes of the forum. If a use that could reasonably be labeled worship or proselytizing nonetheless satisfies the forum's neutral criteria, the Establishment Clause will not justify its exclusion from the forum.

Second, the University argues that funding religious activities with segregated fees would create the appearance that the state endorses a religious message, and unlike *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), there would be no private choice "circuit breaker" between the flow of funds from the state treasury to religious activity.[8] However, *Zelman* was not a public

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[8] In *Zelman*, the Court upheld against an Establishment Clause challenge Ohio's school voucher program, which allowed parents to use state funds to pay parochial school tuition if they

forum case. In a public forum, governmental neutrality towards religion removes the possibility that by granting a religious organization access to the forum, the government will be perceived to be endorsing a religious message. Thus, when a forum is "open to a broad spectrum of groups," granting religion equal access to the forum provides "only incidental benefit to religion." *Pinette*, 515 U.S. at 763, 115 S.Ct. 2440. Similarly, "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274, 102 S.Ct. 269. As in cases such as *Good News Club*, *Rosenberger*, *Pinette*, *Lamb's Chapel*, and *Widmar*, the admission of religion into the University's public forum does not create the appearance that the state endorses the religious messages expressed. No reasonable observer would think that the University has shown a preference for religion by funding student religious activity along with a wide array of other student activity, so long as the religious activity serves the purposes of the forum.[9]

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chose to send their children to parochial rather than public school

[9] Under different facts, a public university's funding of religious activity could violate the Establishment Clause For instance, if a public university opened a metaphysical public forum solely because it wanted to fund religious institutions with state tax dollars, it would likely violate the Establishment Clause because its predominant purpose would be to advance religion. *See McCreary County v Am Civil Liberties Union*, 545 U S 844, 859-66, 125 S Ct 2722, 162 L.Ed 2d 729 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates the Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.") In the present case, however, the University opened the segregated fee forum for secular reasons

Thus, I conclude that the Establishment Clause does not compel the University to categorically exclude worship, proselytizing or sectarian religious instruction from its segregated fee forum. However, as explained in the next section, nothing in the Constitution requires the University to fund all such activities.

3. The University May Adopt Reasonable Content-Based Restrictions to Govern Its Limited Public Forum, Provided that Such Restrictions are Viewpoint Neutral

Although the Establishment Clause neither compels nor authorizes the University to categorically exclude worship, proselytizing and sectarian religious instruction from access to segregated fees, the University may nevertheless be able to exclude some or all of the activities to which it objects. The University need not open its forum to every conceivable student activity. As the *Southworth* Court noted, the University "is free to enact viewpoint neutral rules [restricting access to segregated fees], for it may create what is tantamount to a limited public forum if the principles of viewpoint neutrality are respected." 529 U.S. at 234, 120 S.Ct. 1346. Although *Southworth* does not explicitly require anything other than viewpoint neutrality when choosing among proposed forms of expression, implicit in the Court's use of the phrase "tantamount to a limited public forum" is the additional requirement that any content-based restrictions on speech be reasonable in light of the purposes of the forum. *See, e.g., Good News Club*, 533 U.S. at 106-07, 121 S.Ct. 2093.

In the present case, in addition to its Establishment Clause concern, the University suggests that it will not fund worship, proselytizing or sectarian

religious instruction because these activities are outside the purposes of its forum. The University describes its purposes as follows:

> Although the [U]niversity's financially-supported program to facilitate extracurricular student speech is distinguished . . . by its vast unexplored bounds, the purpose of the forum is not completely unlimited . . . . [T]he University's reason for imposing the segregated fee in the first instance [was] to foster vibrant campus *debate* among students. The [U]niversity has imposed the mandatory fee system to sustain an open *dialogue* for the purpose of ensuring that students have the means to engage in dynamic *discussions* of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. The expenditure of segregated university fees to foster expressive activity that is "debate" and "dialogue" and "discussions of philosophical, religious, scientific, social, and political subjects" is related to and consistent with the [U]niversity's mission to "discover and disseminate knowledge" and to "stimulate society by developing in students heightened intellectual, cultural and humane sensitivities." However, speech that is not "dialogue," or "discussion," or "debate" is not within the boundaries of the program of financially-supported student expression that the [U]niversity created.

(Defs.' Br. in Opp'n at 14 (internal quotation marks and citations omitted, emphasis in original).) In short, the University states that activities which are not "dialogue," "discussion" or "debate" are outside the forum's limited purposes.

However, the University makes this argument at an overly abstract level. It does not define dialogue, discussion or debate, stating only that "religious expression that is speech about a particular topic from a religious point of view" is within the purposes of the forum, but that "religious expression that is or amounts to worship and religious expression that is aimed principally at proselytizing or inculcating belief in a specific faith" is not. (*Id.* at 15.) Later, it adds that "[w]orship is not a dynamic discussion between students; nor is such dynamic discussion present in the inculcation of belief in a particular faith," (*id.* at 27), and that "given the close relationship between proselytizing—the attempt to induce another to convert to one's faith—and the inculcation of a particular faith's religious beliefs, proselytizing is likewise a non-essential component of the system that gives students the means to engage in dynamic discussions." (*Id.*)

The problem with the University's argument is that the issue in the present case is not whether activities that could reasonably be labeled worship, proselytizing or sectarian religious instruction serve the forum's limited purposes, but whether the specific activities that RCF actually engaged in serve such purposes. The labels affixed to an activity are not necessarily dispositive of whether the activity serves the forum's purposes, especially when the labels are broad, as are labels such as worship, proselytizing, inculcation, dialogue, discussion and debate. Rather than relying on highly abstract labels, the University must examine the specific content of each disputed activity in light of the forum's purposes. Further, worship, proselytizing and sectarian religious instruction, and dialogue, discussion and debate, are not mutually exclusive. An activity can integrate

elements of worship and discussion, proselytizing and debate, and instruction and dialogue. An activity that includes some worship cannot be excluded on the ground that it is not "dialogue, discussion or debate" if that activity in fact includes some dialogue, discussion, or debate. In short, before excluding an activity from the segregated fee forum pursuant to a content-based distinction, the University must explain specifically why that particular activity, viewed as a whole, is outside the forum's purposes.

I note also that in deciding how to best utilize a finite amount of segregated fees, the University will inevitably have to make funding decisions that depend on value judgments that cannot be explained with absolute precision. It cannot fund all activities that serve the intentionally broad purposes of the forum, and thus it will have to decline to fund some activities that might in some sense do so. In deciding whether to fund an activity, the University is entitled to assess the *degree* to which the activity would further the purposes of the forum. Thus, although two activities might serve the forum's purposes, the University may conclude that one would make a better contribution and fund only it. *Cf. Widmar*, 454 U.S. at 278-81, 102 S.Ct. 269 (Stevens, J., concurring) (explaining that university officials should be afforded some latitude when determining how best to allocate extracurricular resources). However, because it may not make completely arbitrary decisions or engage in viewpoint discrimination, the University will have to explain its choice. But because all value judgments contain some element of subjectivity, the University's explanation may also be somewhat subjective. As long as it states the reason for its decision as objectively as possible and applies it consistently

among all viewpoints, the University will not violate its students' rights.[10]

For example, the University may decline to fund an RCF activity because it decides that while worship may technically be within the forum's broad purposes, its value to the forum is less than other forms of expression. However, to do so without being legally vulnerable, the University cannot just affix the label "worship" to the activity but must explain the reasoning underlying its decision. The reasoning might be that activities involving little more than an assembly of students who offer praise to a person, object or idea are less valuable to the forum than an assembly of students who engage in the back-and-forth discussion of an idea. Thus, the University may decline to fund activities involving nothing more than mechanical praise,[11] provided that it does not simultaneously fund secular activities that lack a discussion component. Alternatively, the University might conclude that students who wish to worship can do so by attending a local church and that it will

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[10] The University must of course evaluate activities pursuant to clear standards in order to minimize self-censorship and post-hoc rationalizations that serve to mask viewpoint discrimination. *See Southworth II*, 307 F 3d at 575-92 However, it cannot possibly be expected to write down ahead of time every legitimate reason that it might have for funding one activity over another. Thus, the University is entitled to exercise "a certain amount of discretion," so long as that discretion is "no greater than necessary to allow the [University] to evaluate the funding requests " *Id* at 592.

[11] RCF's proposed activities appear to involve more than mechanical praise. They seem to integrate elements of worship and discussion This is why the University's blanket characterization of them as worship is not an adequate reason for excluding them from the forum

reserve segregated fees for activities that, but for the forum, would be unavailable to students, such as programs discussing "sustainable agriculture and food systems within the University and beyond." (PFOF ¶ 441 (description of "F.H. King Students of Sustainable Agriculture" student organization).)[12]

If the University decided that activities involving proselytizing or sectarian religious instruction did not best serve the forum's purposes, it would similarly have to explain those decisions. Given the breadth of the segregated fee forum, the University might have difficulty finding a viewpoint neutral reason for excluding religious proselytizing. Proselytizing is essentially advocacy from a religious viewpoint. If the University excluded all advocacy from the forum, perhaps it could also exclude religious proselytizing. But so long as it funds political, environmental and other advocacy, it is hard to see a viewpoint neutral reason for excluding religious advocacy, although I do not foreclose the possibility that one exists.[13] As for religious instruction, as long

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[12] Relatedly, the University could refuse to fund certain activities on the basis of cost. For instance, RCF's Samuel Group program involved flying nuns to Madison from Italy so that the nuns could discuss RCF members' paths in life. (PFOF ¶ 459) It is unclear whether segregated fees would have paid the nuns' travel expenses, but if so, the University could have refused to pay such an extraordinary expense unless RCF demonstrated an extraordinary justification

[13] Certainly the University could not exclude proselytizing on the ground that it is controversial and might generate student objections. The very rationale of *Southworth* is that before the University can compel students to fund objectionable speech, it must be willing to fund objectionable speech from all viewpoints. 529 U.S at 232, 120 S.Ct. 1346 ("It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable ").

as the University uses segregated fees for instruction on secular topics, it must exercise caution before excluding instruction on religious topics. However, the University may limit the kind of instruction that it will fund. For example, the University might decide to fund only instructional activities in which the students provide a majority of the instruction. Thus, it could deny a request to hire ordained clergy to provide religious instruction. Again, the key is that the University make a judgment about what kinds of activities it will fund, apply that judgment consistently, and not deny funding for religious activities if it funds secular activities of a similar nature.[14]

Finally, the University must evaluate an activity as a whole and not focus only on its possibly objectionable components. Thus, if the University provides a good reason for excluding mechanical worship from its forum, it should deny funding for an organization's activity only if a considerable percentage of the activity involves such worship. For example, the University denied RCF's request for funding for its Evangelical Catholic Summer Camp because the program incorporated "three masses and four communal prayer and worship programs into the program's 96-hour duration." (PFOF ¶ 455.) However, the

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[14] I note that funding religious activities might pose an additional problem in light of the viewpoint neutrality requirement—namely, if a student group representing a particular religion gains access to segregated fees, groups representing other religions might also seek funding, which could lead to religious groups consuming a disproportionate share of segregated fees. However, preventing religion from dominating the forum would justify the University in making content-based distinctions. While the University would have to be careful and avoid favoring one religion over another, the University could take reasonable measures to preserve the forum's diversity.

University acknowledges that the activity predominantly involved training for RCF's student-leaders. (*Id.*) Thus, assuming that the University funds other student leadership retreats, it may not disqualify RCF's retreat simply because it integrates some worship. If, on the other hand, the University reasonably determines that the retreat predominantly involved worship rather than leadership training, it could decline to fund the activity on the ground that it is not within the purposes of the forum. Here, the key is that rather than categorically exclude activities which might contain elements that the University would not fund as freestanding events, the University must evaluate each activity as a whole in light of the purposes of the forum.

With the foregoing principles in mind, I turn to the RCF activities at issue in the present case.

4. The University Has Not Shown that RCF's Activities Are Outside the Limited Purposes of the Forum

Plaintiffs argue that the University engaged in viewpoint discrimination by refusing to reimburse RCF for expenditures in its 2006-07 and 2007-08 budgets.[15] Although plaintiffs frame their argument in terms of viewpoint discrimination, I find that plaintiffs' argument is better characterized as a claim that the University has made content-based distinctions that lack a reasonable basis. It is undisputed that the University refused to fund the disputed

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[15] Recall that the University reimburses student organizations for budgeted expenditures and does not disburse funds until after the organization incurs the expense. In the present case, RCF paid for the disputed activities, and the University declined to reimburse it

activities based on the content of RCF's expression. The only reasons that the University offers to support its content-based distinctions are (1) the Establishment Clause compels it to exclude the activities, and (2) the activities are outside the forum's purposes because they involve worship, proselytizing or sectarian religious instruction and therefore do not involve dialogue, discussion or debate. As discussed above, however, the University would not violate the Establishment Clause if it funded the disputed activities as part of a limited public forum. As also discussed, the University's abstract characterization of the activities as something other than dialogue, discussion or debate simply because they could also be characterized as worship, proselytizing or sectarian religious instruction is an insufficient basis for excluding them from the forum. Accordingly, I conclude that the University's refusal to fund the activities in question was not reasonable in light of the purposes of the forum.[16]

Having decided that the University's content-based exclusion of RCF's activities was unreasonable, I need not determine whether the exclusion also constituted viewpoint discrimination. However, I seriously doubt that the University's conduct could be fairly

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[16] As noted, the University relies on its Establishment Clause argument and makes little effort to explain why the disputed activities do not serve its forum's purposes. I emphasize, however, that nothing in the present decision should be interpreted to preclude the University from refusing to fund the activities presently under review if in future academic years the University advances better reasons for doing so. In the present decision, I do no more than reject the University's Establishment Clause rationale and its categorical exclusion of all activities that in any way involve worship, proselytizing or sectarian religious instruction.

characterized as viewpoint discrimination. Professor Smolla explains the difference between content and viewpoint discrimination as follows:

> A content-based regulation either explicitly or implicitly presumes to regulate speech on the basis of the substance of the message. A viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express. Viewpoint discrimination is a subset of content discrimination, but not all content discrimination is viewpoint discrimination. Viewpoint discrimination is thus an especially egregious form of content discrimination in which the government targets not just subject matter, but the particular views taken on subjects by speakers.

1 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 3:9, at p. 3-12.5 (2007). Similarly, courts have observed that "[c]ontent refers to the topic or matter treated in a particular work. Viewpoint refers to one's opinion, judgment or position on that topic." *Id.* at p. 3-13 (quoting *Amato v. Wilentz*, 753 F.Supp. 543, 553 (D.N.J.1990)).[17]

Plaintiffs have identified no topic on which the University has excluded religious viewpoints. They have not shown, for example, that the University funds secular speech about abortion and birth control but prohibits RCF from expressing a Catholic perspective on these topics. Nor have plaintiffs shown that the University funds some worship but not

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[17] I also note, however, that the line between content-and viewpoint-based distinctions is not always clear *See* 1 Smolla, *supra*, § 3 9, at 3-13

RCF's or that it regulates RCF's speech because of "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510. In fact, the University funds a considerable amount of RCF's religious speech, which shows that the University is not attempting to exclude religious viewpoints from its forum. Thus, I conclude that it would likely be inaccurate to describe the University's actions in the present case as viewpoint discrimination.

B. Criterion C

Plaintiffs also argue that Criterion C, which contains some of the GSSF eligibility criteria, is unconstitutionally vague because it vests student government and University officials with unbridled discretion to determine whether a student organization can receive GSSF funding.[18] In *Southworth II*, the Seventh Circuit held that if University officials had unbridled discretion to determine which groups would be eligible for funding, the segregated fee system would not be viewpoint neutral. 307 F.3d at 575-92. Granting government officials unbridled discretion to determine who may speak in a public forum presents two risks to free expression—the risk of self-censorship and the risk that the official will suppress speech. *Id.* at 576-77. Speakers may restrict their own speech to avoid encountering the government's discretion, and the absence of standards makes it difficult to distinguish

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[18] As indicated, the GSSF eligibility criteria govern whether a student organization is entitled to draw funding from segregated fees, not whether any specific activity in which the organization engages will be funded Once an organization is GSSF-eligible, it can propose a budget and be reimbursed for approved expenditures

between a legitimate restriction of speech and viewpoint discrimination.

The University applied two versions of Criterion C to RCF's request for GSSF eligibility for the 2008-09 academic year. Although the student government struggled to interpret both versions, ultimately the Chancellor found that RCF satisfied the eligibility criteria. Further, the University no longer applies either version of Criterion C. Thus, plaintiff's challenge to Criterion C would appear to be moot. Plaintiffs, however, dispute this on two grounds. First, they invoke the voluntary cessation exception to mootness doctrine, pursuant to which voluntary cessation of challenged conduct will be deemed to moot an action only if it is absolutely clear the conduct is unlikely to recur. *See, e.g., Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000). Plaintiffs argue that by declaring RCF eligible for funding and withdrawing earlier versions of Criterion C, the University voluntarily ceased to engage in the conduct at issue but that it may well resume such conduct in the future. However, when a governmental body corrects its own conduct, the opposing party cannot escape application of the mootness doctrine unless it shows that the government likely made the correction in bad faith and solely to moot the controversy while harboring a secret intent to resume its old ways. *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929-31 (7th Cir.2003); *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir.1991); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988). In the present case, plaintiffs present no evidence that the University acted in bad faith or that it intends to resurrect Criterion C. Thus, the voluntary cessation doctrine is inapplicable.

Second, plaintiffs argue that this claim is not moot because they seek damages for injury suffered while Criterion C was in effect. But because the Chancellor found RCF eligible for funding, the only compensation that plaintiffs seek is for the "countless hours [devoted] to appeals and hearings" before the student government and University officials during the GSSF eligibility process. (Reply Br. at 47.) Essentially, plaintiffs argue that they are entitled to damages for having to use the very appeals procedure that the University established to prevent unconstitutional determinations. *See Southworth II*, 307 F.3d at 591 (noting that the "appeals process operates as a further protection" against unbridled discretion and viewpoint discrimination). However, plaintiffs can obtain damages only for the deprivation of a constitutional right. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). In the present case, having to use the University's appeals process was not itself a violation of plaintiffs' constitutional rights. Moreover, while it was in effect, Criterion C did not prevent plaintiffs from exercising their First Amendment rights. Plaintiffs appealed the adverse decisions made under Criterion C during the 2007-08 academic year, during which time RCF's 2007-08 budget, which was already approved and in effect, would have funded any of RCF's expressive activities. The decisions that the University made pursuant to Criterion C affected only plaintiffs' 2008-09 budget. And because the Chancellor granted GSSF eligibility to RCF prior to the start of the 2008-09 academic year, Criterion C stifled none of plaintiffs' speech. Thus, Criterion C did not deprive plaintiffs of any constitutional right, and it caused them no damages that are recoverable

under § 1983. Accordingly, I will dismiss plaintiffs' claims involving Criterion C as moot.

C. Remedy

Plaintiffs seek numerous forms of relief. First, they ask me to make permanent the preliminary injunction requiring the University to fund worship, proselytizing and sectarian instruction. Second, they seek a declaratory judgment to the same effect. Third, they ask me to require the University to reimburse RCF for the unreimbursed 2006-07 and 2007-08 expenditures. Fourth, they seek an order requiring the University to refund the payments that the student-plaintiffs made to the segregated fee account during the 2006-07 and 2007-08 academic years. Fifth, they demand $300,000 in punitive damages. Finally, they request costs and attorneys' fees.

1. Injunctive and Declaratory Relief Regarding University's Refusal to Fund Worship, Proselytizing and Sectarian Instruction

Primarily, plaintiffs seek to permanently enjoin the University from excluding worship, proselytizing and sectarian religious instruction from the segregated fee forum. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641

(2006); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir.2007).

As discussed, the Establishment Clause does not require or authorize the University to categorically exclude worship, proselytizing or sectarian religious instruction from access to segregated fees. However, neither does the Free Speech Clause compel it to fund them. Rather, the University may adopt reasonable, content-based restrictions that reserve segregated fee funding for those activities that in its judgment best serve the forum's limited purposes. In the present case, the University has not established any reason that justified its exclusion of RCF's activities in 2006-07 and 2007-08. However, as discussed, the University does not have to fund all future activities involving worship, proselytizing or sectarian instruction. Rather, it must review each activity in light of the purposes of the forum, and if an activity that includes, for example, worship serves the forum's purposes, the University may not decline to fund it simply because it integrates some worship. However, if an activity that includes worship does not serve the forum's purposes and the University explains why not with specificity, the University may justifiably exclude it.

Because labels are unhelpful and the University's future funding decisions must be made on a case-by-case basis, I find that it would not be in the public interest to enter a permanent injunction that compels the University to fund, or prohibits the University from refusing to fund, any particular category of activity. Perhaps I could enjoin the University from maintaining a policy that categorically excludes any activity involving worship, proselytizing or sectarian religious instruction, but again the meaning of these

terms will not always be clear. Such an order could well cause the University to fund an activity rather than risk contempt sanctions, even though the University might have legitimate reasons for excluding it. A remedy that better balances plaintiffs' First Amendment interests against the University's need to make funding decisions is a declaratory judgment stating that the University may not categorically exclude worship, proselytizing or sectarian instruction from segregated fee funding unless it does so pursuant to a rationale that is reasonable in light of the purposes of the forum and viewpoint neutral. Such a judgment will protect plaintiffs who, in the event that the University refuses to fund RCF's activities without giving better reasons than it has in the present case, may return to court and enforce the declaratory judgment by seeking an injunction to compel funding of whatever specific activities are at issue and/or damages. At the same time, a declaratory judgment is a less draconian remedy and affords the University greater latitude in evaluating future funding requests.

Based on the foregoing, I will dissolve the preliminary injunction.

2. Monetary Relief

Plaintiffs also request monetary relief to compensate them for RCF's non-reimbursed 2006-07 and 2007-08 expenditures, as well as a refund of the segregated fee payments made by the student-plaintiffs during the 2006-07 and 2007-08 academic years. Before plaintiffs may obtain monetary relief against governmental officials, however, they must overcome several hurdles.

First, although plaintiffs sue defendants in their official and personal capacities, plaintiffs cannot obtain relief against defendants in their official capacities. This is so because suits against defendants in their official capacities are no different than suits against the state, *Kentucky v. Graham*, 473 U.S. 159, 165-68, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and states are not liable for damages under § 1983, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). While § 1983 allows plaintiffs to obtain damages against defendants in their personal capacities, plaintiffs must first show that each defendant personally played a role in depriving them of a constitutional right. *Graham*, 473 U.S. at 166, 105 S.Ct. 3099. In the present case, the parties draw no distinctions between the individual defendants; thus, I assume that each defendant personally participated in the deprivation of plaintiffs' First Amendment rights by discriminating against the content of their speech without a reasonable justification.

Second, as for plaintiffs' claim for damages against defendants in their personal capacities, defendants assert qualified immunity. *Id.* at 166-67, 105 S.Ct. 3099. Governmental officials performing discretionary functions are immune from liability for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity "gives public officials the benefit of the legal doubts" when they make official decisions. *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir. 1991). All officials, save the "plainly incompetent or those who knowingly violate the law" are protected by qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

In the present case, I conclude that defendants are entitled to qualified immunity. The Supreme Court has clearly established two relevant principles. The first is that the Establishment Clause does not justify or require "a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839, 115 S.Ct. 2510. The second is that any content-based exclusions from a limited public forum must be reasonable in light of the purposes of the forum. In applying these principles to the present case, I conclude that the University should not have excluded the RCF activities that it labeled worship, proselytizing or sectarian religious instruction. However, a university administrator could have reasonably applied these principles and concluded that the Establishment Clause required the exclusion of RCF's activities, especially when one considers some of the language that the Supreme Court used in *Rosenberger*.

Recall that in *Rosenberger*, the Court held that a university would not violate the Establishment Clause if it paid the printing costs of a religious student newspaper pursuant to a university policy of using student fees to subsidize student printing expenses. The Court concluded that a university does not violate the Establishment Clause when it "pay[s] for a service" that is "used by a group for sectarian purposes" pursuant to a religion-neutral program. 515 U.S. at 843, 115 S.Ct. 2510. As discussed, I conclude that this principle, when combined with the Court's recognition in cases such as *Widmar* that the government must grant religious worship equal access to a public forum, means that the University would not violate the Establishment Clause if it funded RCF's worship, proselytizing and sectarian

religious instruction along with a wide array of other student activities. *Rosenberger*, however, adds the following language: "We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity." *Id.* at 842, 115 S.Ct. 2510. Rosenberger also states that "[i]t is, of course, true that if a State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 844, 115 S.Ct. 2510.

A university administrator could have reasonably thought that if the University reimbursed RCF's worship, proselytizing and sectarian religious instruction, it would be "making direct money payments to an institution or group that is engaged in religious activity," and "pay[ing] a church's bills." This is especially true given that until UWRCF reorganized itself to qualify as an RSO, it was heavily influenced, if not controlled, by religious officials affiliated with the Roman Catholic Church. (*See* PFOF ¶¶ 466-491 (describing the relationship between RCF and St. Paul's University Catholic Center).) Thus, a reasonable university administrator could have read *Rosenberger* as requiring the exclusion of the RCF activities involving worship, proselytizing or sectarian religious instruction.

Moreover, my conclusion that the Establishment Clause does not justify or require the exclusion of RCF's activities is an application of the above principles to a new set of facts. Although cases such as *Widmar* hold that even sectarian religious activities such as worship are entitled to equal access to a public forum, those were cases involving "brick and mortar" public forums, not the metaphysical forums at issue

in *Rosenberger* and the present case. And while *Rosenberger* cautions against reliance on the distinction between "spending money" and the use of physical facilities, 515 U.S. at 843, 115 S.Ct. 2510, *Rosenberger* involved only a discrete expenditure (printing costs), whereas the funding at issue in the present case is much broader, encompassing as it does the entire universe of student extracurricular activity. A reasonable university administrator could have determined that although Rosenberger permits universities to reimburse religious student groups for discrete expenses incurred by all student journals, it does not allow universities to fund unique sectarian activities that have no secular equivalents, such as RCF's Alpha-Omega events. Funding the latter types of events resembles "pay[ing] a church's bills" to a much greater extent than does paying a religious student newspaper's printing costs along with the printing costs of secular papers, or so a reasonable university administrator could think. Thus, while I conclude that the University may fund RCF's unique sectarian activities when it also funds the unique activities of a wide range of secular student groups, my conclusion nudges the boundaries of clearly established law. Accordingly, defendants are entitled to qualified immunity, and I will deny plaintiffs' demand for monetary relief pursuant to § 1983.

3. Punitive Damages

Plaintiffs have requested punitive damages but make no detailed arguments in support of this demand. Punitive damages are available under § 1983 only "'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Alexander v. City of*

Milwaukee, 474 F.3d 437, 453 (7th Cir.2007) (quoting *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)). Plaintiffs present no evidence even remotely suggesting that plaintiffs acted with such a state of mind. Therefore, I decline to award punitive damages.

4. Attorneys' Fees

Finally, plaintiffs demand attorneys fees pursuant to 42 U.S.C. § 1988, which instructs courts to award attorneys' fees to prevailing parties in § 1983 litigation. The parties have not yet briefed whether plaintiffs are "prevailing parties" within the meaning of § 1988, and therefore I will address this matter in future proceedings.

D. State Law Claims

Plaintiffs also argue that the University's refusal to reimburse RCF for its 2006-07 and 2007-08 expenditures constitutes breach of the settlement agreement and that the state law doctrine of promissory estoppel requires reimbursement. However, these claims fail because plaintiffs have not complied with Wisconsin's notice of claim statutes.

Although Wisconsin allows plaintiffs to sue the state and state officials in their official capacities for breach of contract, to do so, plaintiffs must first present their claims to the State legislature for payment, and only if the legislature denies their claim may they file a lawsuit. *See* Wis. Stat. §§ 16.007 & 775.01; *Brown v. State*, 230 Wis.2d 355, 367, 602 N.W.2d 79 (Ct.App.1999). Here, plaintiffs concede that they did not comply with this procedure, which leaves only their personal capacity claims.

To bring a lawsuit against state officials in their personal capacities, however, plaintiffs must comply with Wis. Stat. § 893.82(3), which in relevant part provides:

> . . . [N]o civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties, . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.

Plaintiffs concede that they did not technically comply with this statute, but they argue that they should be excused from complying because they "have already fulfilled the policy purposes of the statute and can still comply with its technicalities." (Reply Br. at 43.) But the statute itself and the Wisconsin courts state that *strict* compliance is a condition precedent to filing a lawsuit against a state official. *See* Wis. Stat. § 893.82(2m) (requiring strict compliance); *Newkirk v. Wis. Dep't of Transp.*, 228 Wis.2d 830, 833, 598 N.W.2d 610 (Ct.App.1999) (same); *Oney v. Schrauth*, 197 Wis.2d 891, 904, 541 N.W.2d 229 (Ct.App.1995) (same). Therefore, it is irrelevant that plaintiffs may have fulfilled the policy purposes of the statute or that they might still be able to comply with it. The only relevant fact is that they have not yet

strictly complied, and therefore plaintiffs' state law claims seeking monetary relief against defendants in their personal capacities must be dismissed.

Plaintiffs argue that the notice of claim statutes do not apply to their state law claims for equitable relief. To the extent that plaintiff's seek prospective equitable relief, this is true. *Casteel v. McCaughtry*, 176 Wis.2d 571, 584-86, 500 N.W.2d 277 (1993). However, plaintiffs' request for prospective relief pursuant to their state law claims is identical to their request for prospective relief pursuant to their constitutional claims, and having already dealt with plaintiffs' request for prospective relief above, I will not separately discuss such request here. To the extent that plaintiffs seek monetary relief and characterize that relief as equitable, the notice of claim statute still applies. This is so because the notice of claim statute applies whenever a plaintiff seeks retrospective relief—i.e., relief for an injury or damage that occurred in the past—against state officials. *Id.* Here, plaintiffs' claims for reimbursement are claims seeking retrospective relief for injuries that occurred in the 2006-07 and 2007-08 academic years. Therefore, they are barred by § 893.82(3).

III. CONCLUSION

For the reasons stated, IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART and that defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART in accordance with this decision.

IT IS FURTHER ORDERED that plaintiffs' motion to supplement the summary judgment record with newly-discovered evidence is GRANTED.

IT IS FURTHER ORDERED that a telephonic status conference will be held on October 21, 2008 at 1:30 p.m. to determine whether further proceedings are required or whether final judgment should be entered. The court will initiate the call.

APPENDIX C

United States District Court,
W.D. Wisconsin.

No. 07-cv-505-jcs.

ROMAN CATHOLIC FOUNDATION, UW-Madison Inc., Elizabeth A. Planton and Elizather A. Czarnecki,
Plaintiffs,

v.

David WALSH, Mark J. Bradley, Jeffrey Bartell, Elizabeth Burmaster, Eileen Connolly-Keesler, Judith V. Crain, Mary Quinnette Cuene, Danae Davis, Michal J. Falbo, Thomas Loftus, Milton McPike, Charles Pruitt, Peggy Rosenzweig, Jesus Salas, Brent Smith, Michel J. Spector, Kevin P. Reilly, John D. Wiley, Lori M. Berquam, Elton J. Crim, Jr. and Yvonne Fangmeyer,
Defendants.

Jan. 17, 2008.

ORDER

JOHN C. SHABAZ, *District Judge.*

Plaintiffs' motions for preliminary injunctions came on to be heard before the Court in the above entitled matter on January 17, 2008, the plaintiff having appeared by Alliance Defense Fund by David J. Hacker, Travis C. Barham and Jordan Lawrence; defendant by J.B. Van Hollen, Attorney General, by Bruce A.

Olson, Assistant Attorney General. Honorable John C. Shabaz, District Judge, presided.

The Roman Catholic Foundation, UW-Madison, Inc. ("RCF") is a non-profit corporation, and not a church, that came into legal existence on May 1, 2007. RCF was formerly known as the University of Wisconsin-Madison Roman Catholic Foundation, Inc. ("UWRCF"). RCF was created to promote the religious, charitable and education interests of Roman Catholic and non-Roman Catholic students, faculty and staff at UW-Madison. Individual plaintiffs are UW Madison students and members of RCF.

The University of Wisconsin System ("UW System") is a public university in the State of Wisconsin. The UW System Regents ("Regents") issue polices and procedures that each branch in the UW System, including UW-Madison, must adopt.

Most students pay tuition and a student activity fee every semester they attend UW-Madison. The student activity fee is called a Segregated University Fee ("SUF").

UW-Madison invites students to form student organizations and engage in expressive activities on campus. According to the Student Organization Office handbook, registered student organizations ("RSO") receive many benefits from UW-Madison that non-registered student organizations do not. One such benefit is that RSOs are eligible to apply for grants from the student government, i.e., Associated Students of Madison ("ASM").

The Student Services Finance Committee ("SSFC") of the ASM allocates General Student Services Fund ("GSSF") grants. GSSF grants are funded with monies from SUF.

To apply for GSSF funding an RSO must file a GSSF Eligibility Application. If the SSFC approves the application then the RSO is eligible to submit a proposed GSSF budget for SSFC consideration and recommendation. Once an RSO's budget is approved by ASM it still must go to the UW-Madison chancellor who decides whether to recommend to the Regents that the budget be included in the UW Madison budget and then the budget is sent to the Regents for final approval. When an RSO's GSSF budget is approved the RSO does not receive the budget monies in advance. Instead the funding is distributed on a reimbursement basis by submitting receipts and invoices for activities listed in the budget. GSSF funding applications are reviewed a year in advance, which means that applications for the 2008-09 academic year were reviewed in the fall of 2007.

In the fall of 2005, UWRCF applied for GSSF funding for the 2006-07 academic year. The budget was eventually approved in the summer of 2006 when the Regents approved ASM's SUF allocation, which included UWRCF's 2006-07 GSSF budget.

Although UWRCF's 2006-07 GSSF budget had been approved the year before, in the fall of 2006 UWRCF was not permitted to apply for GSSF funding because it was not recognized as an RSO for having failed to satisfy two required criteria. UWRCF filed suit in federal court alleging various constitutional violations against defendants. On May 2, 2007 the parties agreed to a release and settlement agreement. As part of the agreement, UWRCF's revision of its Articles of Incorporation and Bylaws led to it being replaced by RCF in regards to the 2007-08 GSSF budget. RCF was to be considered an RSO in regards to the 2007-08 budget and RCF's proposed

GSSF budget of $253,273.88 was to be approved subject to review for the legality of the proposed expenditures.

Between execution of the May 2, 2007 agreement and August 13, 2007 the parties had several meetings to discuss which of RCF's activities the UW-System would and would not reimburse. On August 13, 2007 defendants explained that several outstanding requests for reimbursements under the 2006-07 budget as well as several upcoming expenses under the 2007-08 budget could not be funded through the SUF. Defendants cited potential violation of the Establishment Clause as why those activities could not be funded. Defendants explained that it would not reimburse funds used for religious speech that is worship, religious proselytizing speech and religious speech that aims to inculcate belief in a particular religious faith.

In the fall of 2007 RCF filed its GSSF Eligibility Application for the 2008-09 academic year but was denied eligibility because the SSFC determined that RCF failed to satisfy the "significant additional components" standard.

Plaintiffs filed two separate motions for preliminary injunction. The first P/I motion requests two things:

> (1) that the Court enjoin defendants from applying a policy or practice of denying plaintiffs reimbursement for speech or expression considered prayer, worship and/or proselytizing;
>
> (2) that the Court require defendants to fund plaintiffs' 2007-08 GSSF budget and fund plaintiffs' outstanding 2006-07 GSSF budget requests.

The second P/I motion also requests two thing:

(1) Same as 1st request in the first P/I motion *supra;*

(2) that the Court enjoin defendants from requiring that plaintiffs satisfy the "significant additional components" standard when applying for GSSF eligibility.

With both motions for P/I plaintiffs request waiver of any bond requirements. Each motion will be addressed separately.

MERITS OF THE 1st P/I Motion:

A. *Likelihood of Success*

Determining the likelihood of success consists of two issues: (1) whether defendants' have engaged in viewpoint discrimination by refusing to provide segregated university fees to fund religious speech considered to be prayer, worship and/or proselytizing; (2) assuming there is viewpoint discrimination, is such discrimination necessary for defendants to avoid violating the Establishment Clause.

1. Merits of Constitutional challenge to whether defendants' refusal to fund religious speech considered to be prayer, worship and/or proselytizing is impermissible viewpoint discrimination:

(a) The state may not exercise viewpoint discrimination, even when it has created its own limited public forum. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

(b) A university's mandatory fee system creates a metaphysical forum of money that can be considered a limited public forum if the principles of

viewpoint neutrality are respected. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 234, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (*Southworth I*); *Rosenberger*, 515 U.S. at 830; *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 580 (7th Cir.2002) (*Southworth II*).

(i) In *Rosenberger* the Supreme Court held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause.

(c) The current action is undistinguishable from *Rosenberger*. As in *Rosenberger*, this case involves the metaphysical forum of money (i.e., segregated student fees) created by a university. Also, like the university in *Rosenberger*, here defendants are refusing to reimburse plaintiffs for certain activities of religious expression and/or speech based solely on the religious nature of the speech. For example, defendants have stated that they will not fund plaintiffs' Samuel Groups because of the prayer and worship involved.

Accordingly, similarly to the university in *Rosenberger* defendants have engaged in viewpoint discrimination in violation of plaintiffs' First Amendment free speech rights and plaintiffs have shown a reasonable likelihood of success on the merits of their First Amendment free speech claim.

2. Merits of defendants' defense that funding religious speech considered prayer, worship and/or proselytizing would violate the Establishment Clause:

(a) Governmental programs can avoid violating the Establishment Clause when the programs use neutral criteria and evenhanded policies, even if benefits are extended to ideologies and viewpoints that are religious. *Rosenberger*, at 839. In *Rosenberger*, the governmental program used by the university was neutral toward religion because its purpose was not to advance religion but to open a forum for speech and to support various student enterprises in recognition of the diversity and creativity of student life. *Id.* at 840.

(i) In the current action, the funds that RCF would be receiving through reimbursement are open and available to a diverse list of other groups. The metaphysical forum of segregated student fees created by defendants was meant to open a forum to all types of student organizations, clearly not just religious student organizations, and therefore the policy of providing such monies is neutral toward religion.

(b) Furthermore, in *Rosenberger*, "[t]he viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46.

(i) Similar to the university in *Rosenberger*, in this case defendants' practice of examining and interpreting plaintiffs' activities to determine if they are prayer, worship and/or proselytizing

runs the risk of fostering a pervasive bias or hostility toward religion, which could undermine the very neutrality the Establishment Clause requires.

(b) Moreover, according to the reasoning in *Southworth I*, in a university setting, mandatory segregated student fees paid to the university and provided to student groups is not speech of the university or its agents. *Southworth* I, 529 U.S. at 234-35. Also, "[S]ubsidized student organizations at public universities are engaged in private speech, not spreading state-endorsed messages. . . . It would be a leap . . . to suggest that student organizations are mouthpieces for the university." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir.2006).

(i) Here, RCF, as a subsidized student organization engaged in private speech at a public university, would not be assumed to be a mouthpiece for the university. Also, providing monies from mandatory segregated student fees to student groups, even religious student groups, does not make the groups' speech the university's speech, i.e. government speech.

Accordingly, defendants' funding of plaintiffs' religious expression in the form of prayer, worship and/or proselytizing through segregated student fees would not violate the Establishment Clause and plaintiffs have shown a reasonable likelihood of success on their First Amendment claim defeating defendants' Establishment Clause defense.

B. *Irreparable Harm*

"The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which

money damages are not adequate." *Christian Legal Soc'y*, 453 F.3d at 859. Plaintiffs' likelihood of success on their First Amendment free speech claim creates an irreparable harm as it relates to future loss of First Amendment freedoms.

However, plaintiffs' second request, which is for money to pay for past expression that was engaged in but not reimbursed, does not create an irreparable harm. If plaintiffs do prevail money damages would be adequate to remedy defendants' failure to reimburse plaintiffs for those costs.

C. *Balance of Harms*

The only harm defendants raised was that funding plaintiffs' religious speech would violate the Establishment Clause. This harm has been dealt with as it is reasonably likely that such funding does not violate the Establishment Clause. Accordingly, there is no harm to balance against plaintiffs' irreparable harm of a loss of First Amendment freedoms.

D. *Public Interest*

"[I]njunctions protecting First Amendment freedoms are *always* in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859 (emphasis added). Accordingly, an injunction protecting plaintiffs' First Amendment freedom would be in the public interest.

MERITS OF THE 2nd P/I Motion:

A. *Likelihood of success*

Plaintiffs' second motion for preliminary injunction has two requests. The first request was the same as the first request in its first motion for preliminary injunction and accordingly the Court need not go through the same analysis.

In plaintiffs' second request addressing the likelihood of success consists of one core issue: (1) whether a vague standard used in the process of allocating mandatory segregated student fees vests the student government with unbridled discretion.

1. Merits of whether a vague standard vests the student government with unbridled discretion:

(a) The principal authority for addressing this issue is found in *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566 (7th Cir.2002) (hereinafter *Southworth II*).

(b) Plaintiffs in *Southworth II* argued that the student government had unbridled discretion "because some of the criteria are subjective and thus subject to manipulation." *Id.* at 590.

(c) However, the Seventh Circuit disagreed and explained that "it is always possible that the student government, or select student representatives, could ignore the Funding Standards and manipulate the eligibility and funding criteria to mask their viewpoint discrimination. But this possibility exists in almost every licensing or permit case. . . . [W]hile the Funding Standards provide some flexibility, the possibility of viewpoint discrimination is greatly reduced by the many other factors, procedural safeguards and appeals process." *Id.* at 590. The Seventh Circuit further explained that "[w]hile the Funding Standards grant a certain amount of discretion, that discretion is no greater than necessary to allow the student government to evaluate the funding requests." The court went on to conclude that the "funding Standards sufficiently bridled the SSFC and ASM finance Committee's discre-

tion to satisfy the First Amendment's mandate of viewpoint neutrality and the prohibition on granting decision makers unbridled discretion." *Id.* at 592.

(i) Here, the "significant additional components" standard, even if vague as opposed to being subjective, merely provides the student government with an amount of flexibility and discretion that appears "no greater than necessary to allow the student government to evaluate the funding requests." *Id.* at 592. Also, the other procedural safeguards (e.g., the appeals process and recorded hearings) support that the student government does not have unbridled discretion.

(c) Accordingly, it is not likely that plaintiffs' would be successful in proving that the "significant additional components" standard provides the student government with unbridled discretion.

(d) Plaintiffs' failure to prove a likelihood of success on the merits of their claim that the "significant additional components" standard provides the student government with unbridled discretion in violation of the First Amendments viewpoint neutrality requirement, requires denial of their requested preliminary injunction.

In conclusion, the facts presented in plaintiff's first motion for preliminary injunction suggest that plaintiff has a reasonable likelihood of success of on its First Amendment free speech claim against defendants concerning defendants' practice and policy of denying reimbursement of plaintiff's religious speech considered prayer, worship and/or proselytizing. This

reasonable likelihood of success requires that plaintiff's first request in their first motion for preliminary injunction be granted. However, plaintiff's request for money for outstanding reimbursements for past activities can be addressed by money damages at the end of the litigation and plaintiff's second request in their first motion for preliminary injunction will be denied.

Furthermore, Federal Rule of Civil Procedure 65(c) requires plaintiffs, as the party seeking the preliminary injunction, to give security for the payment of such costs and damages as may be incurred by defendants if it is found that defendants were wrongfully enjoined. Based on the activities that defendants had indicated as non-reimbursable in plaintiffs' 2007-08 budget, the Court deems as proper security the sum of $20,000.00. Plaintiffs may give security in the form of a bond in accordance with Federal Rule of Civil Procedure 65.1.

The facts presented in plaintiffs' second motion for preliminary injunction suggest that plaintiffs are unlikely to succeed on their claim that defendants' "significant additional components" standard provides the student government with unbridled discretion in violation of the First Amendment's requirement of viewpoint neutrality. Accordingly, plaintiffs' second motion for preliminary injunction will be denied.

ORDER

IT IS ORDERED that as to plaintiffs' first motion for preliminary injunction, defendants' are ENJOINED from enforcing any policy that prohibits or prevents plaintiffs from applying for or obtaining reimbursement for activities listed in plaintiffs' 2007-08 approved budget because the activities are or in-

volve religious speech considered prayer, worship and/or proselytizing.

IT IS FURTHER ORDERED that plaintiffs' second motion for preliminary injunction is DENIED.

APPENDIX D

United States District Court,
W.D. Wisconsin.

Case No. 07-C-0505.

ROMAN CATHOLIC FOUNDATION, UW-Madison, Inc., et al.,
Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, David G. Walsh, et al.,
Defendants.

Dec. 16, 2008

DECISION AND ORDER

LYNN ADELMAN, District Judge.

Plaintiff Roman Catholic Foundation, UW-Madison, Inc. ("RCF") and two of its student members, Elizabeth A. Planton and Elizabeth A. Czarnecki, brought this action against the Regents of the University of Wisconsin and various University officials ("the University") under 42 U.S.C. § 1983.[1] Plaintiffs challenged the constitutionality of the University's refusal to fund certain activities out of the University of

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[1] Although the parties and I refer to the defendants collectively as "the University," the University is not, as an entity, a defendant in this case. The defendants are the state officials who participated in the decision to deny RCF's funding requests

Wisconsin-Madison's segregated fee account, which funds a variety of student activities. They argued that the refusal to fund activities involving "worship," "proselytizing" or "sectarian religious instruction" constituted viewpoint discrimination in violation of the First Amendment. The University argued that the First Amendment's Establishment Clause required it to refuse to fund such activities.

On September 24, 2008, I granted-in-part and denied-in-part plaintiffs' motion for summary judgment. *See Roman Catholic Foundation, UW-Madison, Inc. v. Regents of University of Wis.*, 578 F.Supp.2d 1121 (W.D.Wis.2008).[2] I found that by categorically refusing to fund activities that it labeled worship, proselytizing or sectarian religious instruction, the University unreasonably excluded activities based on their content from its segregated fee system, a limited public forum. I expressed doubt that the University's policy constituted viewpoint as opposed to content-based discrimination. I concluded that the Establishment Clause did not compel the University to exclude plaintiffs' religious activities from the forum, and that it did not justify the University's unreasonable content-based discrimination. Based on these conclusions, I granted plaintiffs' request for declaratory relief, stating that the University's policy violated the First Amendment. However, I denied plaintiffs' request for monetary and injunctive relief and dissolved a preliminary injunction entered by the Honorable John C. Shabaz, who previously presided over the case.

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[2] Below, I will cite to my prior opinion as "Order" and give the memorandum opinion page numbers, not the Westlaw page numbers

On October 8, 2008, plaintiffs moved for reconsideration. Although they agree with my determination that the University violated the First Amendment, they argue that (1) in granting a preliminary injunction, Judge Shabaz made rulings that are the "law of the case" and binding on me; (2) defendants are not entitled to qualified immunity and therefore are liable for monetary relief; (3) plaintiffs are entitled to a ruling on their Free Exercise and Equal Protection claims; and (4) plaintiffs are entitled to a permanent injunction. Before I address these arguments, I note the somewhat unusual nature of plaintiffs' motion. Although they won their case on the merits, plaintiffs disagree with my reasoning and seek different relief. In particular, they object to my characterizing the University's policy as unreasonable content-based rather than viewpoint discrimination. They further argue that the University may not engage in even reasonable content-based discrimination. However, whether the University's policy is characterized as unreasonable content-based or viewpoint discrimination does not affect the outcome of the case. Either way, the policy violates the First Amendment. Whether or not the University may make reasonable content-based distinctions also does not affect the outcome of the case because here the content-based distinctions were *un* reasonable and therefore unconstitutional.

Furthermore, even if the University's policy is characterized as viewpoint discrimination, it would have no effect on the relief that plaintiffs would receive. The reason plaintiffs cannot obtain monetary relief is because defendants are entitled to qualified immuni-

ty.[3] The reason that defendants are entitled to qualified immunity is because their view that the Establishment Clause barred the University from funding worship, proselytizing and sectarian religious instruction was reasonable. As I explain in more detail below, the Establishment Clause defense applies with equal force no matter how plaintiffs' free speech claim is characterized. As I also discuss, the defense also applies to plaintiffs' Free Exercise and Equal Protection claims. Finally, as I also explain below, a declaratory judgment is an adequate remedy and a permanent injunction is inappropriate.

Thus, although plaintiffs raise a number of issues which are largely academic, in the interest of completeness, I will address their arguments, particularly insofar as they might affect the outcome of the case.

1. Law of the Case and Related Arguments

Disagreeing with my view that the University engaged in unreasonable content-based discrimination rather than viewpoint discrimination, plaintiffs argue that pursuant to the law of the case doctrine, I am bound by Judge Shabaz's conclusion "that *Rosenberger* [*v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995),] controls this case and that the University discriminated against

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[3] Plaintiffs cannot obtain monetary relief against defendants in their official capacities because state officials acting in such capacities are not liable for damages under 42 U S C § 1983 Thus, whether defendants are liable for monetary relief turns on whether they are liable in their individual capacities Such liability, in turn, depends on whether defendants are entitled to qualified immunity

RCF due to its viewpoint." (Pls.' Mem. of Law in Supp. of Mot. for Recons. at 3.) As indicated, however, whether the University's policy is characterized as unreasonable content-based or viewpoint discrimination does not affect the outcome of the case. Either way, the University violated plaintiffs' First Amendment rights and plaintiffs receive the same relief. Nonetheless, Judge Shabaz's view of the present case seriously differs from my own. He regarded the case as indistinguishable from *Rosenberger*, while I consider it different enough to make the University's Establishment Clause defense reasonable. Because my differences with Judge Shabaz on this point are relevant to whether defendants are entitled qualified immunity, I will explain them in some detail.

In summary, if Judge Shabaz meant that the present case was in all respects indistinguishable from *Rosenberger*, I believe that he was clearly wrong.[4] *See United States v. Harris*, 531 F.3d 507, 513 (7th Cir.2008) (explaining that law of the case can be reconsidered for compelling reasons, such as clear error). In my September 24 decision, I explained why under *Rosenberger* and other Supreme Court cases the University's policy against worship, proselytizing and sectarian religious instruction was un-

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[4] To be fair to Judge Shabaz, he was concerned only with plaintiffs' request for a preliminary injunction and had no occasion to consider whether defendants were entitled to qualified immunity. Had he considered *Rosenberger* in connection with plaintiffs' request for damages, he may well have concluded that the present case was sufficiently different from *Rosenberger* to support defendants' entitlement to qualified immunity Accordingly, the law of the case doctrine may not apply at all Even if it does, however, for the reasons indicated above, I am not bound by Judge Shabaz's conclusions

constitutional. (578 F.Supp.2d at 1129-31.) I stated that these cases established the proposition that the government does not violate the Establishment Clause when it grants a religious organization equal access to a forum, even a "metaphysical" forum involving money, and even if the religious group seeks to use the forum for worship, proselytizing or other "core" religious activities. (578 F.Supp.2d at 1131-33.) However, in analyzing defendants' entitlement to qualified immunity, I found the present case different enough from *Rosenberger* to make reasonable defendants' belief that the Establishment Clause required the University to exclude worship, proselytizing and sectarian religious instruction from the segregated fee forum. (578 F.Supp.2d at 1140-42.)

Plaintiffs argue that *Rosenberger* is so similar to the present case that it compels the conclusion that defendants violated their clearly established rights. However, as explained in my original order, *Rosenberger* is distinguishable because it involved university funding of a much narrower range of student activities. *Rosenberger* involved only university reimbursement of the cost of printing a student journal. *Id.* at 844, 115 S.Ct. 2510. In contrast, the present case involves university funding of a wide range of student activities. (*See* Pls.' Resp. to Prop. Finding of Fact ["PFOF"] ¶ 441 (describing the groups and activities funded with segregated fees).) This difference in scope is important for qualified immunity purposes because in explaining why reimbursement of a religious student journal's printing costs did not violate the Establishment Clause, the *Rosenberger* Court emphasized the narrow scope of the printing program at issue. 515 U.S. at 842-44, 115 S.Ct. 2510. The

Court explained that a university's payment of a religious student organization's printing costs was not meaningfully different from the university's purchasing its own printer and making it available to all student journals, whether religious or secular. *Id.* at 843, 115 S.Ct. 2510 ("There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf."). The Court also emphasized that "[p]rinting is a routine, secular, and recurring attribute of student life." *Id.* at 844, 115 S.Ct. 2510. The Court concluded that because the scope of the University of Virginia's funding program was narrow and because the expense at issue was shared by all student journals, the university was not in danger of "paying a church's bills" or "subsidizing [a church]" in violation of the Establishment Clause. *Id.*

In the present case, segregated fees pay for much more than services the University could have provided itself, and the expenses for which RCF seeks reimbursement are not expenses shared by all student organizations. (*See* 578 F.Supp.2d at 1127-28.) Some of the disputed RCF activities involve ordained clergy, and RCF seeks "payment for the services provided by . . . nuns and priests." (PFOF ¶ 457 (description of Mentoring for Busy Students program).) Other activities involve prayer and worship. In their proposed findings of fact, the parties describe the disputed activities as follows:[5]

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[5] The parties' descriptions of the activities at issue do not give a complete picture of each activity, and the parties dispute some

- *Evangelical Catholic Summer Training Camp.* The students at the July 27, 2007, meeting provided information about the August 2007 Evangelical Catholic Summer Training Camp. They described the program as an event mainly attended by UWRCF's or RCF's student coordinators, and noted that the program is essentially a retreat that serves as training for the organization's leaders. The materials submitted in support of RCF's payment request included the daily schedule which included three masses and four communal prayer and worship programs into the program's 96-hour duration. In addition, the chart of RCF programs, events, and services provided to the SSFC on February 21, 2008, represents that prayer, worship, and proselytizing are intended consequences of the Evangelical Catholic Summer Training Camp. John Koczela, a Dorm Intern who attended the program, concurred that worship and proselytizing are intended consequences of the program. (PFOF ¶ 455.)

- *Alpha-Omega Program.* For its Alpha-Omega program, UWRCF purchased a drum shield on April 11, 2007, and submitted the bill and payment justification to the Dean of Students' office for reimbursement. The justification indicated that the drum shield was to be used for the band that leads praise and worship weekly

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of the details However, the undisputed facts are sufficient to demonstrate that RCF's activities included substantial prayer and worship components

at each Alpha Omega event. At the July 27, 2007, meeting, the students confirmed that the band plays praise and worship music at the start and end of UWRCF's Alpha Omega meetings. The chart of RCF programs, events, and services provided to the SSFC on February 21, 2008, represents that worship is an intended consequence of the Alpha-Omega program. Students familiar with the Alpha-Omega program concurred. (PFOF ¶ 456.)

- *Mentoring for Busy Students.* At the July 27, 2007, meeting, the students stated that students participating in the Busy Person's Retreat (*i.e.*, Mentoring For Busy Students) met with one of the spiritual directors for spiritual mentoring/counseling and to talk about anything they wanted for a half-hour. The spiritual directors included Catholic nuns and priests who would offer guidance or prayer if requested by the student. UWRCF requested GSSF funding for payment for the services provided by the nuns and priests and for their meals. The supporting documentation submitted with the payment request identified prayer as an integral, not optional, component of the program and equal to the spiritual counseling component. UWRCF sought reimbursement for 15 entertainment contracts ($1,500), parking ($175), food ($194.88), and advertising ($228.54). (PFOF ¶ 457.)

- *Samuel Group Program.* At the July 27, 2007, meeting, the students provided information about the Samuel Group program, which was an item in the 2007-08 budget. The students

described the program as involving three Catholic nuns who travel from Italy to spend the school year in Madison to meet with participating students individually each month for a year in an effort to help the students look more closely at their path in the world. The students stated that the rules for participation in the program are very serious. The students acknowledged that the program incorporates instruction about the acceptable roles for Roman Catholics, spiritual guidance, prayer, and specific assistance in discerning their vocational role in the church. Father Nielsen described the Samuel Group as a vocational discernment group, meaning discernment as to when a person is meant to be a priest, or religious, or to be married. The program brochure confirmed the students' description of the program. (PFOF ¶ 459.)

- *Evangelical Catholic Institute.* At the July 27, 2007, meeting, the students described the 2007 Evangelical Catholic Institute as a primary training institute for their leaders to learn from the Catholic perspective how to talk to people about prayer, worship, and the Catholic faith. The request for reimbursement was for expenses UWRCF agreed to pay related to the program in lieu of registration fees for attendees. These expenses included printing of information about the Institute, UWRCF's portion of speaker fees for Cardinal Dulles and another speaker (Richard Cleveland), speaker airfare, lodging and food costs, and newspaper advertisements. . . . The schedule for the Evan-

gelical Catholic Institute incorporated two masses and three praise and worship programs into the program's 48-hour duration. The program included a "Praise and Worship Clinic" to provide musicians, singers, and worship leaders with tools and experiences to bring vibrant praise and worship home to their ministry, a[n] "Evangelical Catholic Preaching Clinic", and a "Sharing the Good News Clinic" to provide attendees with effective ways to evangelize. The program also included numerous workshops providing instruction in effective techniques for Catholic proselytizing, the creation of small and large group Catholic ministries, and implementing evangelical Catholic campus ministries. (PFOF ¶ 460.)

- *Rosary Booklets.* The students at the July 27 meeting described the Rosary booklets as assisting students in learning more about the Rosary prayer itself as well as how to pray the Rosary. Lynch also reviewed UWRCF's purchase justification documents outlining the Rosary books and Rosary cards expense which noted that the pamphlet guides would be used in faith-sharing small groups to teach students how to pray the Rosary and learn more deeply this form of prayer. (PFOF ¶ 462.)

Again, as I read *Rosenberger* and related cases, the involvement of clergy in and the substantial worship components of the activities in the present case did not require the University to exclude the activities from the segregated fee forum. However, a reasonable University administrator (i.e., one who is not "plainly incompetent" or who does not "knowingly

violate the law," *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)) could have concluded that the highly sectarian and unique aspects of RCF's activities brought them within *Rosenberger*'s admonition that the state not "pay a church's bills" or "subsidize it." Indeed, in some respects, RCF resembles a student-run church. In any event, the wide-ranging and highly sectarian funding requests at issue in the present case are a far cry from the discrete printing costs at issue in *Rosenberger*. For this reason, I conclude that *Rosenberger* is not so similar to the present case that it deprives defendants of qualified immunity. Reasonable university administrators could have concluded that the Establishment Clause prohibited the University from funding the RCF activities at issue.

Plaintiffs also argue that I am bound by Judge Shabaz's conclusion that the University's policy constitutes viewpoint discrimination rather than, as I concluded, unreasonable content-based discrimination. As indicated, at this point in the case, the distinction is largely academic because however characterized, the University's policy is unconstitutional and defendants' entitlement to qualified immunity is unaffected. But I reiterate that in my view, the University's policy is better characterized as unreasonable content-based rather than viewpoint discrimination. (578 F.Supp.2d at 1137-38.) Plaintiffs do not identify any topic concerning which the University excluded a religious viewpoint. They have not shown, for example, that the University funds secular speech about abortion and birth control but prohibits RCF from expressing a Catholic perspective on these top-

ics.[6] Nor have plaintiffs shown that the University funds some worship but not RCF's. In fact, the University funds a considerable amount of RCF's religious speech-including RCF's small and large group discussions about religion, educational and service offerings, theater and choral activities, and new-student and freshman welcoming activities (PFOF ¶ 465)—indicating that the University is not attempting to exclude religious or Catholic viewpoints from its forum.

In *Rosenberger*, the Court identified a specific viewpoint against which the University of Virginia discriminated-namely, a viewpoint that "'primarily promotes or manifests a particular belie[f] in or about a deity or ultimate reality.'" 515 U.S. at 822-23, 115 S.Ct. 2510. In the present case, I can identify no "viewpoint" embodied in plaintiffs' worship, proselytizing, and other sectarian activities. Indeed, the labels "worship," "proselytizing" and "sectarian religious instruction" do little more than describe categories of expressive activity and do not themselves

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[6] In their motion for reconsideration, plaintiffs attempt to show that the University has favored secular speech but discriminated against RCF's religious speech on the same topic. The example they use is leadership training the University funded the leadership training retreats of secular groups but did not fund RCF's leadership retreat because it included worship as part of the program (Pls ' Mem. of Law in Supp. of Mot for Recons. at 13.) However, the University did not discriminate against RCF because RCF intended to present a Catholic or religious viewpoint on the topic of leadership, but rather because RCF's leadership retreat incorporated prayer, masses, and other forms of worship. Nothing in the record indicates that RCF's prayer, mass, or worship sessions dealt with the topic of leadership.

adumbrate a viewpoint. Saying that discrimination against worship or proselytizing is viewpoint discrimination is like saying that discrimination against poems or newspapers is viewpoint discrimination. Although it may be viewpoint discrimination to favor poems about love over poems about religion, or newspapers written from a secular editorial viewpoint over those written from a religious editorial viewpoint, it seems like a misuse of the term "viewpoint discrimination" to describe discrimination against *all* poems or *all* newspapers as viewpoint discrimination.

Perhaps, however, the term "viewpoint discrimination" could be stretched to cover the University's policy against funding worship, proselytizing and sectarian religious instruction. As I noted in my September 24 decision and as the Seventh Circuit recently reiterated, "[d]istinguishing between a permissible content-based restriction and an impermissible viewpoint-based restriction is not always easy." *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008). But again, the difference between content-based and viewpoint discrimination does not alter the outcome of the case, because the University's policy is unconstitutional under either characterization. The difference may well be relevant when the University evaluates future funding requests, but such requests are not now before me. If in the future the University denies funding to a religious student group pursuant to a reasonable content-based distinction, the affected student group will be able to litigate the question of whether the distinction also constitutes viewpoint discrimination. Such a case might present a better record from which to evaluate whether the distinction is based on viewpoint rather than just content. In-

deed, once the University advances a permissible reason for engaging in content discrimination, it might be easier for a court to determine whether the discrimination is also viewpoint discrimination. The reason for the distinction itself might reveal whether it is viewpoint-based.

Plaintiffs also argue that the University should not be permitted to make *any* content-based distinctions, even reasonable ones, because it has created a designated public forum, not simply a limited public forum.[7] But once again, I have already found that the University's policy is unconstitutional, and it is unconstitutional no matter how the forum is characterized. Therefore, there is no need to play the forum "classification game," *Gilles v. Blanchard*, 477 F.3d 466, 474 (7th Cir.2007), and I decline to comment further on this issue.

2. Request for Monetary Relief

Plaintiffs next argue that they are entitled to monetary relief even if the defendants have qualified immunity. This is so, argue plaintiffs, because they are not seeking monetary relief in the form of damages but are seeking "reimbursement in the form of specific performance of the University's obligation to pay all of [RCF's outstanding expenditure requests]." (Pls.' Mem. of Law in Supp. of Mot. for Recons. at 19.) However, whether they call it "damages," "reimbursement," "specific performance," or "equitable re-

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[7] Although reasonable content-based distinctions are permitted in a limited public forum, such distinctions are not permitted in a designated public forum unless the government satisfies strict scrutiny. *See, e.g., DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7th Cir.2001)

lief," the remedy that plaintiffs seek is the payment of money out of defendants' own pockets. Yet qualified immunity protects officials against personal liability for monetary relief regardless of the label used to describe it. *Lenea v. Lane*, 882 F.2d 1171, 1178-79 (7th Cir.1989). Accordingly, qualified immunity precludes plaintiffs' claim for monetary relief even if such relief is labeled as something other than "damages."

3. Free Exercise and Equal Protection Claims

Plaintiffs next argue that I should adjudicate their Free Exercise and Equal Protection claims against the University. However, these are simply alternative legal theories seeking the same relief that plaintiffs seek in connection with their Free Speech claim. Because plaintiffs have already won their Free Speech claim, analyzing their Free Exercise and Equal Protection claims would be superfluous and constitute the unnecessary consideration of constitutional questions. *See, e.g.*, *Doe v. Heck*, 327 F.3d 492, 527-28 (7th Cir.2003) (stating that a federal court should avoid deciding constitutional issues unnecessarily). Even if the University's policy violates the Free Exercise and Equal Protection clauses, defendants would still be entitled to qualified immunity based on their Establishment Clause defense because they reasonably believed that their interest in avoiding an Establishment Clause violation was a compelling state interest. *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (stating that compliance with the Establishment Clause may be a compelling state interest); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (same); *Wid-*

mar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (same). Further, whether the constitutional violation is described as a Free Speech, Free Exercise, or Equal Protection violation, I would not award injunctive relief because, as I explain below, a declaratory judgment is adequate prospective relief. Thus, because an analysis of plaintiffs' Free Exercise and Equal Protection claims would not change the outcome of the case, I will not further engage in such an analysis.

4. Request for Injunctive Relief

In my September 24 decision, I declined to grant plaintiffs an injunction. (578 F.Supp.2d at 1140-41.) Plaintiffs ask that I reconsider and enjoin defendants from refusing to fund "activities that involve or include elements of student prayer, worship, proselytizing, or sectarian religious instruction." (Pls.' Mem. of Law in Supp. of Mot. for Recons. at 21.) They ask that the injunction include language stating that the University may not exclude any religious speech from the forum on the ground that funding such speech would violate the Establishment Clause. (*Id.*)

Before discussing plaintiffs' request, I reiterate that I have already granted declaratory relief and stated that the University's policy against funding any activity that it labels worship, proselytizing or sectarian religious instruction is unconstitutional, and that the Establishment Clause does not require the University to exclude plaintiffs' religious activity from its forum of segregated fees. Thus, should the University in the future exclude student speech from the forum for no reason except that it considers the speech worship, proselytizing or sectarian religious

instruction, plaintiffs can return to court and obtain additional relief. Further, because the present litigation has clearly established that the Establishment Clause does not require the exclusion of worship, proselytizing or sectarian religious instruction from the segregated fee forum, in future cases University officials will not be entitled to qualified immunity, and so an injured student will be able to obtain monetary relief.

Plaintiffs' seek injunctive relief because they believe that the University "complies with the Constitution only when a court orders it to do so," that it will "return to its old ways in the future," and that it would be inefficient for them or another student group to return to court to obtain additional relief. (*Id.*) However, by way of the declaratory judgment, I have already ordered the University to abandon its unconstitutional policy, and I have no reason to believe that the University will not do so. Further, even if I converted the declaratory judgment into an injunction, plaintiffs would still have to return to court in the event of a violation. Injunctions do not enforce themselves, and thus an affected student group would have to move for contempt sanctions or other relief if it regarded the University as violating its terms. Also, any future proceedings brought to enforce an injunction would differ little from proceedings to enforce the existing declaratory judgment, and I therefore doubt that issuing an injunction would result in greater efficiency. If anything, entering an injunction might waste judicial resources, since it could lead to continued judicial oversight of the administration of the University's segregated fee system when, at this point, there is no reason to be-

lieve that such involvement is necessary. In sum, a declaratory judgment is adequate prospective relief.

Moreover, as I explained in my September 24 order, whether any particular activity or form of expression can or cannot be excluded from the segregated fee forum must be evaluated in light of the facts surrounding that particular activity or form of expression. (578 F.Supp.2d at 1133-37, 1139-41.) By maintaining its segregated fee forum, the University is not compelled to grant *every* request involving an activity that could be characterized as worship, proselytizing or sectarian religious instruction. These labels are themselves vague and could be reasonably affixed to a wide array of different activities and forms of expression. Some future proposals that could be so labeled will be outside of the forum's limited purposes, and even if they are all within the forum's purposes, the University must be able to exercise some amount of discretion to determine how best to allocate the limited pool of segregated fees among student organizations. Thus, I find that it would be inappropriate to enter an injunction (or any other order) stating that the University must fund *all* activities involving elements of worship, proselytizing, or sectarian religious instruction. Although the University cannot continue its policy of automatically disqualifying any activity that involves what it considers worship, proselytizing or sectarian religious instruction, whether any future refusal to fund a specific religious activity is constitutional or not will have to be determined based on the facts surrounding that activity and the reasons that the University gives for refusing to fund it.

CONCLUSION

For the reasons stated, IT IS ORDERED that plaintiffs' motion for reconsideration is DENIED.

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(3)

Supreme Court
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No. 10-731

IN THE

Supreme Court of the United States

DAVID G. WALSH, et al.,

Petitioners,

v.

BADGER CATHOLIC, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

The University of Wisconsin funds a broad variety of student expression through its mandatory student fee system. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). However, the University does not fund private student speech it determines to be prayer, worship, or religious instruction.

1. Whether the Seventh Circuit correctly held that the University violated the First Amendment by excluding otherwise permissible private expression from a forum for student speech, solely because the University deems the speech to be prayer, worship, or religious instruction.

2. Whether the Establishment Clause requires the University to single out private student religious expression for exclusion from a forum opened for student expression on all other topics.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent Badger Catholic, Inc., states that it is a non-stock corporation under Wisconsin law, with no parent or publicly held company owning 10% or more of its stock.

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STATEMENT OF THE CASE

This case concerns questions of law resolved long ago by this Court: namely, whether the government violates the Freedom of Speech Clause by selectively excluding private student expression because of its religious content and viewpoint from a speech forum, and whether the Establishment Clause requires a state university to ban otherwise permissible student speech from a forum because it determined the speech to be prayer, worship and proselytizing. Petitioners are members of the Board of Regents of the University of Wisconsin System, the System president, and officials of one of its branch campuses, the University of Wisconsin-Madison (collectively, "University"). Respondents are a recognized student organization at the University and two former students (collectively, "Badger Catholic"). The courts below held the University's policy of prohibiting the use of student activity fees for otherwise permitted activities that may include student-led prayer, worship, and proselytizing violated the First Amendment. The Petition contains an incomplete and inaccurate account of the record below.

A. The University's Student Activity Fee Forum

The University collects a mandatory segregated university fee ("SUF") from every student each semester. Ct. of Appeals Sep. App. of Appellants ("A-Ap.") p. 173 ¶20; 300-01 ¶437. The SUF is a noninstructional fee collected in addition to tuition.

A-Ap.300-01 ¶437. It is divided into allocable and nonallocable portions. A-Ap.173-74 ¶21; 301 ¶439.

The allocable SUF pays for activities of registered student organizations ("RSOs"). A-Ap.174 ¶22; 301-02 ¶¶439-40. The purpose of the SUF is to facilitate and encourage RSO activities that address philosophical, religious, scientific, social, and political subjects. A-Ap.302-06 ¶441; Ct. of Appeals Sep. App. of Appellee ("A.") 146-207. "The speech the University [of Wisconsin] seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds." *Southworth*, 529 U.S. at 232.

However, University policy prohibits the use of SUF for any RSO activity that includes student-initiated prayer, worship, proselytizing, or inculcation of belief.[1] A-Ap.191-92 ¶94-96; 250-51 ¶239; A.130-34. The University claims the Establishment Clause requires this selective exclusion of student speech.

The University's Board of Regents, chancellors, and students share responsibility for disposition of the allocable SUF. Wis. Stat. § 36.09(5) (2011). One way the University allocates SUF to RSOs is through the General Student Services Fund ("GSSF"). A-Ap.176 ¶33; 178 ¶36; 179 ¶43. The GSSF provides operations funding to eligible RSOs.

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[1] The University refers to its policy as prohibiting "worship, proselytizing, or inculcation of a particular religious belief." Pet. 14. Because proselytizing and inculcation of a particular religious belief are synonyms, Badger Catholic simply refers to this as promoting its beliefs or evangelism.

A-Ap.179 ¶42. The Student Services Financial Committee ("SSFC"), a committee of Associated Students of Madison ("ASM," the student government), allocates the GSSF to eligible RSOs. A-Ap.178 ¶37; 199-200 ¶116. The ASM, chancellor, and Regents must approve these allocations. A-Ap.190 ¶89; 307 ¶¶444-45.

The SUF is not a "limited budget." Pet. 14. The University allocates funds to RSOs and then determines how much money it will charge each student to fund the SUF. A-Ap.178 ¶¶38-39. Thus, the funds in the SUF are not scarce; they have no preset limit.

GSSF-funded RSOs do not receive direct money payments. RSOs access their GSSF allocation through submission of purchase orders, use of the University credit card, or reimbursement of expenses incurred by individual students. University officials audit each expense before payment to determine if the use of funds complies with University policy, and state and federal law. A-Ap.200-01 ¶¶118-19, 121.

Many RSOs receive GSSF budgets and engage in a wide variety of speech (self-described by the organizations below) in accord with the University's purpose for this metaphysical forum of funding:

- Campus Women's Center provides resources to students, support and discussion groups on politics and policy, outreach programs about campus safety, and volunteers for free childcare.

- Collegians for a Constructive Tomorrow offers an internship program and brings speakers to campus.

- CALS Student Council unites student groups interested in agriculture and life sciences through picnics, leadership retreats, workshops, and educational and professional development opportunities.

- F.H. King promotes sustainable agriculture and provides internships, gardening training, and advocacy for change in food production, lectures, workshops, and outreach activities.

- Jewish Cultural Collective hosts speakers and holds campus activities using theatrical, journalistic, and musical mediums.

- LGBT Campus Center educates the campus community, provides safe spaces for students to socialize and access resources, hosts programs and social and support groups, offers peer mentoring, advocates for the needs of LGBTQ students, develops leaders, and provides speakers willing to break down the barriers of "homophobia" and "heterosexism."

- MEChA educates the campus about Chicana/o and Mexicana/o history, develops political consciousness, and holds

workshops on social justice, cultural awareness, and political consciousness.

- MultiCultural Student Coalition promotes cultural awareness through initiating administrative and political changes to address the needs of students of color and under-represented groups. It provides advertising and campaign planning, research, leadership development opportunities, and training to enhance skill development. It also facilitates meetings, engages in public speaking, teaches management skills, and increases awareness on current issues.

- Rape Crisis Center provides twenty-four hour response, campus support groups, and counseling for sexual assault victims, and educational presentations and workshops.

- Sex Out Loud promotes "healthy sexuality" through "sex positive" education and activism, distributes contraceptives, and holds awareness events.

- Student Leadership Program provides classroom learning opportunities to develop leadership skills.

- WISPIRG advocates for consumer rights, environmental protection, democracy issues, and hunger and homeless issues. It uses awareness events, leadership

training, conferences, rallies, petitions, lobbying government, and media.

- WSUM 91.7 FM is the student-run radio station.

- Wunk Sheek preserves its spiritual view and educates the community about the cultural identity of Native Americans. It provides workshops, speakers, activities, awareness, cultural experiences, powwows, and information on indigenous culture, politics, life, and history.

A-Ap.302-06 ¶441; A.146-207.

B. The University's Exclusion of Badger Catholic's Speech

Since Badger Catholic first applied for GSSF funding, the University has singled out its religious speech for discriminatory treatment. A-Ap.201-02 ¶¶123-24. For example, in 2005, the SSFC denied several of Badger Catholic's funding requests because they were "too Catholic" and included student-led worship. A-Ap.209-10 ¶142. Former Chancellor John Wiley agreed with SSFC and wrote: "State monies cannot be used to support religious activities, per the Establishment Clause of the First Amendment to the U.S. Constitution. . . . My review has identified numerous aspects of the funding approved for the [Badger Catholic] that potentially violate this prohibition." A-Ap.213 ¶¶149-50; A.210. Eventually, Wiley approved Badger Catholic's budget, but instructed ASM and SSFC to "probe the

nature/content of programming offered by religious entities" in the future, because he was concerned about funding Badger Catholic's religious activities and instruction. A-Ap.219 ¶167; 307 ¶446; A.220.

1. The 2006 Litigation

In 2006, Badger Catholic sued the University for rejecting its application for RSO status and for refusing to fund some of its activities.[2] A-Ap.221-23 ¶¶174-75; 307-08 ¶¶447-48. The District Court preliminarily enjoined the University's non-discrimination policy that caused the RSO status denial. A-Ap.223 ¶176; 308 ¶449; *see Univ. of Wis.-Madison Roman Catholic Found., Inc. v. Walsh*, No. 06-C-649-S, 2007 WL 765255, *2 (W.D. Wis. Mar. 8, 2007).

The parties eventually settled. A-Ap.223 ¶177. Badger Catholic agreed to remove non-students from leadership, and "not seek funding for Masses, weddings, funerals, or other sacramental acts requiring the direct control of ordained clergy." A-Ap.223 ¶178; A.125 ¶2, 127 ¶5. The University agreed to approve Badger Catholic's 2007-08 GSSF budget, to review SUF funding requests "without reference to the religious viewpoint of the program or activity," and to review Badger Catholic's funding requests "in the same manner as it reviews the budget requests of other RSOs." A-Ap.224-25 ¶¶179-80; A. 126-27 ¶4.

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[2] At that time, both students and non-students led Badger Catholic, which used the name "University of Wisconsin Roman Catholic Foundation, Inc."

2. The 2007 Litigation

Less than a month after executing the settlement agreement, the University refused to fund certain portions of Badger Catholic's 2006-07 GSSF budget. A-Ap.225-28 ¶¶181-88. A series of meetings initiated by the University followed. During the meetings, University officials identified several of Badger Catholic's 2006-07 budget items that they believed violated the Establishment Clause, including Lenten booklets, rosary pamphlets, the Busy Person's Retreat, a drum shield for the Alpha Omega band, and the Evangelical Catholic Institute. A-Ap.230 ¶196; A-Ap.231 ¶200. These activities were part of Badger Catholic's approved GSSF budget. Badger Catholic students had already spent the money expecting the University to approve the expenses, but the University refused. A-Ap.231 ¶201. University officials refused to release SUF funds for any activities that involved what the University determined to be student-led prayer, worship, "proselytizing," or the inculcation of values. A-Ap.230-31 ¶¶198-99.

Instead of relying on the descriptions of these expenses detailed in Badger Catholic's GSSF funding application, University officials—following Chancellor Wiley's directive—probed the nature and purpose of each activity by asking detailed questions of Badger Catholic's student leaders. The University expressed concern about activities that included what the University determined to be student-led prayer, worship, and "proselytizing," A-Ap.241-42 ¶221, but could not identify how much prayer, worship, and "proselytizing" in an activity would

cause the withholding of funds, A-Ap.196 ¶¶107-08; 197-99 ¶¶111-13; 250-51 ¶239.

During the last meeting, the University detailed each activity it refused to fund. In Badger Catholic's 2006–07 budget, it refused to fund: the drum shield for the Alpha Omega band, the Evangelical Catholic Institute, and the Busy Persons Retreat. A.130-34, 138-39; A-Ap.244 ¶226; 245-48 ¶230; 309 ¶453. In the 2007–08 budget, it refused to fund: the Evangelical Catholic Summer Training Camp, Samuel Group, Mentoring for Busy Students, Evangelical Catholic Ministry Institute, rosary booklets, Lenten booklets, and Alpha Omega. A.130-34, 140; A-Ap.244-45 ¶227; 245-48 ¶230; 249 ¶234; 310 ¶454; 314 ¶463.

Each activity the University refused to fund is similar in nature – in secular terms – to funded expressive activities of other RSOs. The Evangelical Catholic Institute was a leadership training program conducted from a Catholic perspective. Badger Catholic's budget included expenses for printing costs, speaker honoraria, transportation, lodging and board, and newspaper advertisements in the student newspaper. Contrary to Petitioner's implication, Pet. 7, the budget did not include funding for Masses or praise and worship programs, though those activities did take place. A-Ap.234-36 ¶207; 312-14 ¶460.

The Busy Persons Retreat (i.e., Mentoring for Busy Students) provided students with the opportunity to meet with a spiritual counselor for career, personal, spiritual, and educational

mentoring and counseling. Some of the counselors were nuns and priests. Badger Catholic's budget included funding for the services and meals of these counselors. Voluntary prayer occurred during portions of the activity. A-Ap.234 ¶206; 311 ¶457.

Alpha Omega was a weekly large group meeting that included speakers, music, and time for students to socialize and interact with one another. Badger Catholic's budget included funding for a drum shield for the student band that played music during the meeting. A-Ap.236-37 ¶208; 310-11 ¶456.

The Evangelical Catholic Summer Training Camp served as a leadership training event for students. The budget expenses included registration fees for students. The activity included elements of prayer, worship, and proselytizing. A-Ap.310 ¶455.

Samuel Group was a counseling program offered by Badger Catholic for students who wanted to regularly meet with a counselor in order to determine their vocation. Students operated the program and nuns provided guidance, prayer, and vocational discernment, including advice on what academic major to pursue. A-Ap.312 ¶459.

Badger Catholic's budget included funds to purchase Rosary booklets, which it offered to University students who wanted to learn more about the Rosary prayer and how to pray it. A-Ap.314 ¶462.

The University refused to fund expenses related to these activities (and cautioned Badger Catholic

that other activities were borderline) because they included some amount of what the University concluded was student-led prayer, worship, or "proselytizing." In response, Badger Catholic commenced litigation.

C. The District Court's Decisions

After filing suit, Badger Catholic moved for a preliminary injunction against the University's policy, which the District Court (Shabaz, J.) granted on January 17, 2008. The court enjoined the University from "enforcing any policy that prohibits or prevents plaintiffs from applying for or obtaining reimbursement for activities listed in plaintiffs' 2007-08 approved budget because the activities are or involve religious speech considered prayer, worship and/or proselytizing." App. 82-83a. In so ruling, the court noted this case is "undistinguishable from *Rosenberger* [*v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995)]," App. 76a, and rejected the University's sole defense: that the Establishment Clause justified its policy, App. 77-78a.

The parties cross-moved for summary judgment. On September 24, 2009, the District Court (Adelman, J.) declared the University's policy unconstitutional in violation of the First Amendment. App. 54-55a, 61-62a. The District Court rejected the University's sole defense of its policy and held that it does not violate the Establishment Clause to provide SUF funding to students expressing religious viewpoints in a public forum. App. 47a. The court also held the

University's policy was unreasonable in the limited public forum because the University used abstract characterizations to label activities as prayer, worship, and proselytizing instead of determining whether the specific activities serve the purposes of the forum. App. 49a, 54-55a. The court entered a declaratory judgment that the "University may not categorically exclude worship, proselytizing or sectarian instruction from segregated fee funding unless it does so pursuant to a rationale that is reasonable in light of the purposes of the forum and viewpoint neutral." App. 62a. Thus, the University's refusal to release funds for Badger Catholic's 2006-07 and 2007-08 activities was unconstitutional.[3] App. 54-55a.

D. The Seventh Circuit's Decision

The University appealed the District Court's decision, and Badger Catholic cross-appealed. The Seventh Circuit affirmed the declaratory judgment, in an opinion written by Chief Judge Easterbrook. The court held the University unconstitutionally discriminated against Badger Catholic's speech in violation of the First Amendment. The court, relying on this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger*, 515 U.S. 819, determined the University does not violate the Establishment Clause by funding Badger Catholic's

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[3] Badger Catholic moved the District Court to reconsider its declaratory judgment and requested it also enjoin the University's policy, order payment of funding denied to Badger Catholic, and rule on the Free Exercise Clause and Equal Protection Clause claims. The District Court refused to reconsider. App. 103a.

programs. App. 4-7a. It also found that decisions since *Rosenberger* "reinforce its conclusion that underwriting a religious speaker's costs, as part of a neutral program justified by the program's secular benefits, does not violate the Establishment Clause even if the religious speaker uses some of the money for prayer or sectarian instruction." App. 6a (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)). Although the court avoided labeling the University's policy and action as either viewpoint or content discrimination, it concluded that because the University, for example, "has chosen to pay for student-led counseling . . . its decision to exclude counseling that features prayer is forbidden under *Widmar* and its successors." App. 8a.

The court also rejected the University's new argument on appeal that even if the Establishment Clause does not prohibit it from funding Badger Catholic, under *Locke v. Davey*, 540 U.S. 712 (2004), the University is not required to do so. The court distinguished *Locke* on two grounds. First, in *Locke*, Washington's program "did not evince hostility to religion," but the University's does because it excludes religious prayer and instruction. App. 9a. Second, in *Locke*, the "state's decision []concerned how to use funds over which it retained plenary control" and ultimately was a form of government speech, so forum analysis was "simply inapplicable." *Id.* But, here, the University is not espousing its own message. It "created a public forum where the students, not the University, decide what is to be said." App. 10a.

The court recalled that the University itself "persuaded the Supreme Court [in *Southworth*] to hold that dissatisfied students are not entitled to get their student-activity fees back, precisely because the fees are used to operate a public forum in which students themselves, and not the University, decide what is to be said." *Id.* As to the University's contention that Badger Catholic's programs include too much devotional activity, the court questioned how the University "would deal with an application by a student group comprising members of the Society of Friends," as "Quakers view communal silence as religious devotion." App. 11a.

Finally, the court deferred its decision until after this Court issued *Christian Legal Society v. Martinez* ("*CLS*"), 130 S. Ct. 2971 (2010), to "see whether the Court would modify the approach [of viewpoint neutrality] articulated in *Widmar*, *Rosenberger*, and *Southworth*." App. 11a. The Seventh Circuit found that this Court did not modify that approach, as "no Justice disagreed with the proposition that 'any access barrier must be reasonable and viewpoint neutral' and that 'singling out religious organizations for disadvantageous treatment' is permissible only if the requirements of 'strict scrutiny' can be satisfied." App. 12a (citing *CLS*, 130 S. Ct. at 2984, 2987). The court also noted that *CLS* described *Widmar* as a "case holding that refusing to allow 'religious worship and discussion' in a public forum is forbidden viewpoint discrimination." App. 12a (citing *CLS*, 130 S. Ct. at 2987). Thus, the court concluded that there "can be no doubt" that the University's SUF "must cover Badger Catholic's six contested programs, if similar programs that

espouse a secular perspective are reimbursed." App. 12a.

Judge Williams dissented. She disagreed with the panel's conclusion that "purely religious activities have 'little meaning on their own' and cannot be meaningfully distinguished from the categories of 'dialog, discussion or debates from a religious perspective.'" App. 19a (citation omitted).

In Judge Williams' view, "Badger Catholic would only have a claim of viewpoint discrimination if the University was choosing to allocate funding for Presbyterian or Baptist or Jewish religious services but declining to fund Catholic worship services," and even if this had a disparate impact on religious groups, that would not constitute viewpoint discrimination. App. 21-22a. Ignoring record facts, she found that the forum is limited by the amount of money in the fund; thus, the University's decision to draw a line at a category such as purely religious activities is not unconstitutional. App. 22-23a.

Finally, Judge Williams agreed with the panel's conclusion that the University does not violate the Establishment Clause by funding Badger Catholic's activities, but determined the University acted constitutionally by choosing to not fund these activities. App. 27-28a.

REASONS FOR DENYING THE WRIT

The Petition does not merit certiorari because it raises issues previously resolved by this Court in *Widmar*, *Rosenberger*, and *Southworth*. Those decisions establish that a public university must allocate student activity fees on a viewpoint neutral and reasonable basis; that the exclusion of religious expression from such a forum is not viewpoint neutral; and that the state does not violate the Establishment Clause by providing religious students equal access to the forum. The Seventh Circuit correctly applied those decisions to declare unconstitutional the University's exclusion of Badger Catholic's otherwise permissible expression just because the University considered them prayer, worship, and "proselytizing."

The Petition also asks this Court to create an unmanageable distinction between religious worship and speech from a religious viewpoint, a distinction this Court already rejected in *Widmar* and its progeny. The University is not entitled to any deference that allows it to gerrymander its SUF forum in a way that violates the First Amendment. Nor is there a conflict among the circuits on the questions presented. In fact, the circuits agree with the Seventh Circuit's decision below.

I. The Seventh Circuit Correctly Applied *Widmar*, *Rosenberger*, and *Southworth*.

In analyzing the University's exclusions of any Badger Catholic activity deemed to include too much student-led prayer, worship, and proselytizing, the

Seventh Circuit correctly applied this Court's holdings in *Widmar*, *Rosenberger*, and *Southworth*. Those cases hold that when the government opens a public forum to encourage private student expression, it may not exclude student expression merely because of its religious content, or because it communicates religious viewpoints on permitted forum topics. Those decisions and others firmly reject the University's unprincipled and unmanageable distinction between religious worship and speech from a religious viewpoint. Thus, the University is not entitled to any discretion from this Court for its decision to exclude otherwise eligible student expression from its broad public forum simply because of the religious content of the students' speech.

A. Exclusion of Religious Modes of Speech Communicating Religious Viewpoints on Permitted Forum Topics Violates the First Amendment.

For at least thirty years, this Court's precedent has rejected government attempts to exclude religious modes of speech from public fora. The question presented by the Petition is one this Court has answered time and again, and the Seventh Circuit correctly applied that precedent.

In *Widmar*, the University of Missouri Kansas City provided meeting facilities for student organizations, except "for purposes of religious worship or religious teaching." 454 U.S. at 265. Cornerstone, a religious student organization, desired to use the university's facilities for its

meetings, which typically included "prayer, hymns, Bible commentary, and discussion of religious views and experiences." *Id.* at 265 n.2. The university rejected Cornerstone's request. *Id.* at 265. This Court held the university created a public forum by opening its facilities and that its content-based restriction on religious worship and religious teaching was not necessary to serve a compelling state interest. *Id.* at 277. The university argued the Establishment Clause required it to reject Cornerstone's application, but the Court rejected this argument, finding that the primary effect of the forum was not to advance religion, but to advance speech. *Id.* at 273. Petitioners characterize *Widmar*'s holding as narrow and one that is silent to the permissibility of prohibiting religious worship in a limited public forum. Pet. 16. Yet Cornerstone undeniably engaged in worship and proselytizing, as it sang "hymns" and "discuss[ed] religious views," both modes of speech present in this case.

In *Rosenberger*, the University of Virginia allowed official student organizations to apply for student fee funding. However, the university prohibited the allocation of fees for "religious activities," which it defined as "any activity that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." 515 U.S. at 825 (internal quotation marks omitted). Qualified groups submitted bills to the university, which then paid directly the group's creditors upon determining the expenses were appropriate. *Id.*

Wide Awake Productions, an eligible student organization, requested funds to publish "a

magazine of philosophical and religious expression." *Id.* The mission of the magazine was to "challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. The University denied Wide Awake's request because it violated the ban on "religious activities." *Id.* at 827.

This Court held that the denial of Wide Awake's application constituted viewpoint discrimination. *Id.* at 832. This Court found that the state may reserve a forum for certain groups or topics, but once the university opens a metaphysical forum for student speech, it may not "exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of viewpoint." *Id.* at 829. The university did not exclude religion as a subject matter in the forum, but excluded religious viewpoints on every topic. *Id.* at 831. The Court rejected any distinction between religious speech and speech about religion, finding it lacks "intelligible content." *Id.* at 845 (citing *Widmar*, 454 U.S. at 269 n.6). The Court also rejected the university's plea that economic scarcity justified its exclusion of religious activities, as viewpoint discrimination cannot be justified on that basis. Nor did the Court accept the university's assertion that it would violate the Establishment Clause by funding religious activities, because private individuals were speaking and the guarantee of government neutrality toward religion is respected, not offended, when the government extends access to a forum for broad and diverse ideologies. *Id.* at 839, 842.

In *Southworth*, students at the University of Wisconsin challenged the state's ability to extract a mandatory student fee from them that was used to fund RSOs with which the students disagreed. 529 U.S. 217. The student "speech the University [sought] to encourage in the program" was "distinguished not by discernable limits but by its vast, unexplored bounds." *Id.* at 232. Like Badger Catholic's case, RSOs did not receive lump-sum payments of cash, but obtained funding by submitting receipts and invoices. *Id.* at 225. This Court determined that the mandatory fee created a forum for private student speech, not University speech. *Id.* at 229. Thus, this Court rejected the students' request to strike down the mandatory fee, but conditioned operation of the fee system on the university allocating the fee to RSOs on a viewpoint neutral basis. *Id.* at 230.

The Seventh Circuit's decision correctly applied the foregoing precedent and held that the University discriminated against Badger Catholic by denying it student activity fee funding for any activity the University determined contained too much student-led prayer, worship, or proselytizing.

First, the Seventh Circuit determined that *Widmar* and *Rosenberger* both held that the University does not violate the Establishment Clause by funding Badger Catholic's programs. App. 4-5a. The "University of Missouri contended, just as the University of Wisconsin has done, that any subsidy to worship would violate the Establishment Clause." App. 5a. But "[a]s long as the University makes facilities equally available to secular and

sectarian groups . . . there is no constitutional problem." *Id.* Thus, Cornerstone, like Badger Catholic here, "was entitled to a room where its members could meet, pray, sing hymns, and proselytize." *Id.*

The court recalled that in *Rosenberger*, the University of Virginia argued there is a difference between providing access to facilities and reimbursing a religious speaker's expenses. App. 6a. However, the Seventh Circuit found that this Court rejected that theory and "reiterated *Widmar*'s conclusion that withholding support of religious speech when equivalent secular speech is funded is a form of forbidden viewpoint discrimination. *Id.* The "University of Wisconsin itself persuaded the Supreme Court [in *Southworth*] to hold that dissatisfied students are not entitled to get their student-activity fees back precisely because the fees are used to operate a public forum in which students themselves, and not the University, decide what is to be said." App. 10a.

The University argues that this case presents "special Establishment Clause dangers" of making "direct money payments to sectarian institutions." Pet. 30 (citing *Rosenberger*, 515 U.S. at 842). But the University argues from a false premise. The record shows—and Petitioners overlook—that the University does not make "direct money payments" to Badger Catholic. RSO activities are funded by paying contractors directly, use of the University credit card, or reimbursement to individual students. A-Ap.200 ¶¶118-19. The concern identified in *Rosenberger* is not present in this case. Further,

Badger Catholic is not a "sectarian institution," it is a student group. *Widmar* and *Rosenberger* held there were no Establishment Clause dangers in providing in-kind or monetary support to those groups. Nor is there a danger with Badger Catholic.

Second, the Seventh Circuit held that *Widmar* and its progeny forbid the University from excluding any otherwise permissible Badger Catholic activity that features student-led prayer, worship, or evangelism. App. 8a. Noting that a university can define the kind of extracurricular activities it chooses to promote, the Seventh Circuit found that "the University of Wisconsin has chosen to pay for student-led counseling," like Badger Catholic's Busy Persons Retreat and Samuel Group. App. 8a. The religious meetings in *Widmar* parallel the content of Badger Catholic's activities here: "offering of prayer," "singing of hymns in praise and thanksgiving [worship]," "sharing of personal views and experiences (in relation to God) by various persons [evangelism, or as the University calls it, 'proselytizing']," "exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles [inculcation of religious beliefs]," and "an invitation to the interested to meet for a personal discussion [proselytizing]." *Chess v. Widmar*, 635 F.2d 1310, 1313 (8th Cir. 1980), *aff'd* 454 U.S. 263 (1981). Badger Catholic's programs were nearly identical. For example, the Alpha-Omega event was a weekly speaker series and large meeting of students that included worship and sometimes proselytizing and prayer. A-Ap.236-37 ¶208; 310-11 ¶456. The Evangelical Catholic Institutes were leadership

training events that included opportunities for worship, prayer and proselytizing. A-Ap.234-36 ¶207; 312-14 ¶460. Thus, the University's denial of funding to Badger Catholic discriminates against religious modes of expression conveying religious viewpoints on permitted forum topics. *See CLS*, 130 S. Ct. at 2987 (describing *Widmar*'s holding as that the refusal to allow "religious worship and discussion" in a public forum is viewpoint discrimination).

Petitioners contend the Seventh Circuit held they cannot refuse to fund pure religious worship. Pet. 27. In actuality, the court held that because the University funds counseling, leadership training, tutoring and other activities from a secular perspective, it cannot refuse to fund these same activities conducted by Badger Catholic solely because the activities might include religious modes of speech. App. 8a. Nor did Badger Catholic request funds for "pure religious worship." Badger Catholic's GSSF budget included funds for travel expenses, conference fees, printing costs, speakers, and meals. A-Ap.234-36 ¶¶206-07; 311-14 ¶¶457, 460. "Pure religious worship" is not at issue.

Finally, the court withheld its decision until this Court decided *CLS* to see whether this Court would modify the approach articulated in *Widmar*, *Rosenberger*, and *Southworth*. App. 11a. This Court left that approach in place. Thus, the Seventh Circuit had "no doubt" that the University "must cover Badger Catholic's six contested programs, if similar programs that espouse a secular perspective are reimbursed." App. 12a.

The Seventh Circuit correctly applied this Court's holdings in *Widmar*, *Rosenberger*, and *Southworth*. Each of these rulings refute the University's justifications for discriminating against Badger Catholic. By allocating mandatory student activity fees to RSOs for a broad range of expressive activities, the University created a public forum for private student speech. Having created such a forum and allowing students to engage in counseling, leadership training, advocacy, and many other activities, the University engaged in unconstitutional discrimination by refusing to fund any Badger Catholic activity that included too much of what the University defined as student-led prayer, worship, or "proselytizing."

B. The Government May Not Choose to Exclude Religious Viewpoints from a Forum.

Although the University's main defense in the District Court was that funding Badger Catholic would violate the Establishment Clause, it shifted gears at the Seventh Circuit (and in the Petition), to claim that *Locke v. Davey*, 540 U.S. 712 (2004), permits the University to withhold funds from religious speakers in a public forum. The Seventh Circuit considered and rejected this improper application of *Locke*. App. 8a. The University also claims that its discretion in regulating its forum provides a defense here, a notion this Court has rejected firmly.

The University asserts that *Locke* permits it to refuse to fund certain types of religious expression.

But the University misreads *Locke* to permit a public university to gerrymander its forum to single out religious expression opened generally for student speech. *Locke* did not overrule *Widmar*, *Rosenberger*, and *Southworth* and does not justify the University's policies here.

Locke concerned a college scholarship program, funded by taxes, that students could use for any degree, except degrees in theology. 540 U.S. at 716. This Court considered whether pursuant to Washington's state constitution, which prohibited even indirect funding of religious instruction, the state could exclude theology degrees from the program without violating the Free Exercise Clause of the federal constitution. *Id.* at 719. This Court upheld the restriction, but limited its holding to the specific facts of the case.

The Seventh Circuit correctly distinguished *Locke* from this case on two grounds. First, in *Locke*, the state's program did not evince hostility toward religion, as the scholarship could be used at pervasively sectarian colleges where prayer and religious instruction were part of the program, but not to train for the ministry. App. 9a. Unlike Washington, the University prohibits the use of the funds for student-led prayer or religious instruction, which singles out and shows hostility toward religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (holding regulation of conduct undertaken for religious reasons violates the Free Exercise Clause).

Second, the scholarship program in *Locke* was government speech, which is why this Court "declared that public-forum analysis was 'simply inapplicable.'" App. 9-10a (citing *Locke*, 540 U.S. at 720 n.3). By contrast, the University is not "propagating its own message;" rather, it created a public forum for private student speech and must honor the choices of those private speakers to engage in religious expression. App. 10a. The Seventh Circuit's conclusion on this point is correct, because if *Locke* applied to speech fora, it would effectively overrule *Southworth* and *Rosenberger*, which it clearly did not do.

Despite this, the University argues it must exclude religious speech because Wisconsin's constitution makes the University's mission secular in nature,[4] and because the SUF is deposited in state coffers, the use of those funds cannot violate the state constitution. Pet. 31. These same facts were present in *Southworth* and did not change this Court's conclusion that the University must provide viewpoint neutral access to SUF. *See Southworth*, 529 U.S. at 222. In addition, the allocable student fees, regardless of whether they enter state coffers, belong wholly to the students, not the state. *See Rosenberger*, 515 U.S. at 851-52 (O'Connor, J., concurring) (finding the student activity fund "represents not government resources," "but a fund that simply belongs to the students"); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (citing with authority Justice O'Connor's

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[4] The University never raised this state constitutional defense in the District Court.

Rosenberger concurrence describing the private nature of the SUF).

Contrary to the Petition, the University does not permit RSOs to use the SUF funds only for activities that "promote the mission of the institution." Pet. 32. The University makes the SUF money available to fund as much expressive activity as possible. *See Southworth*, 529 U.S. at 232 ("The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds.").

The Seventh Circuit also correctly rejected the University's plea that it is entitled to "discretion" in determining which RSO activities violate its view of the Establishment Clause. Pet. 32. The courts "owe no deference to universities when" they consider "the question whether a public university has exceeded constitutional constraints." *CLS*, 130 S. Ct. at 2988. The University's decision to exclude student speech with religious content from the forum of funding is not a question of educational policy warranting deference by the courts; it is a question of constitutional permissibility. The University repeatedly invokes the Establishment Clause as justifying its policy of speech exclusion. But universities have no special expertise to determine constitutional questions. Courts are the experts on those questions. Nor has the University ever expressed a pedagogical reason for excluding religious expression from the wide-open forum. Indeed, for the University to parse which student speech qualifies as "worship" or "proselytizing" is not "discretion" but rather excessive entanglement with

religion in violation of the Establishment Clause.[5] The University has rested its defense on providing a legal reason to exclude Badger Catholic—the Establishment Clause—and the Seventh Circuit properly rejected that reason based on this Court's precedent.

C. This Court Has Already Considered and Rejected Distinctions Between Religious Speech and Speech from a Religious Viewpoint.

As the Seventh Circuit correctly concluded, this is not a "mere" religious worship case. However, even if it was, the Court should deny certiorari because the Court has already considered and rejected a distinction between religious worship and speech from a religious viewpoint. Further, the Petition's reliance on federal statutes that make a distinction between religious speech and speech from a religious viewpoint is irrelevant.

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[5] The Petition states that the University relied on Badger Catholic's own descriptions of its activities in determining, for example, whether they were "worship." But this is both irrelevant and inaccurate. First, the theological categories Badger Catholic uses to label its expression do not determine how it is categorized under First Amendment law. Second, the University independently reviewed and refused to fund a number of activities before it met with Badger Catholic, so the University entangled itself with religion by examining each activity and deciding whether it was too religious. The only Establishment Clause violation here is the University's efforts to parse through the speech of Badger Catholic to determine whether it is forbidden "worship" and "proselytizing" or not.

The record shows that Badger Catholic did not engage in "mere" religious worship, prayer, and proselytizing, nor did its GSSF budget include funding for "mere" religious activity. Rather, Badger Catholic's budget included funding for speaker honoraria, travel costs, printing, advertising, supplies, and registration fees. A-Ap.234-37 ¶¶206-08; 310-14 ¶¶455-57, 459-60, 462. These costs were associated with student counseling, leadership training, educational materials, and large group speaker events. While student-led prayer, worship, and proselytizing may have occurred during those activities, each of the disputed activities had secular counterparts in other RSO activities.

Badger Catholic's activities included student-led prayer, worship, and evangelistic speech, but this Court has "not excluded from free-speech protections religious proselytizing, . . . or even acts of worship." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted). Nor has this Court distinguished between religious viewpoints and "religious worship." In fact, *Widmar* reached the opposite conclusion and found that the university "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." 454 U.S. at 269. A distinction between religious worship and speech from a religious viewpoint "lacks a foundation in either the Constitution or in our cases, and is judicially unmanageable." *Id.* at 271 n.9.

Further, a distinction between religious viewpoints and "religious worship" is unintelligible and unworkable. In *Rosenberger*, Wide Awake sought to proselytize the University of Virginia campus through its newspaper. *See* 515 U.S. at 867 (Souter, J., dissenting) (finding the magazine "is [a] straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ"); *see also id.* at 826. Nevertheless, this Court, relying on *Widmar*, found that there can be no distinction between religious speech and speech about religion:

> [T]he dissent fails to establish that the distinction between religious speech and speech about religion has intelligible content. There is no indication when singing hymns, reading scripture, and teaching biblical principles cease to be singing, teaching, and reading—all apparently forms of speech, despite their religious subject matter—and become unprotected worship.

Id. at 845 (citing *Widmar*, 454 U.S. at 269 n.6) (quotation marks omitted).

Similarly, in *Good News Club*, a Christian club sought to use the school facilities for prayer, worship, proselytizing and religious instruction. 533 U.S. at 103 (majority), 137-38 (Souter, J., dissenting). In comparing the Good News Club to

Lamb's Chapel,[6] the Court found that the only difference between the two "is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a "religious viewpoint" and the exclusion of either constituted viewpoint discrimination. *Id.* at 109-10. Thus, not only did this Court not find a difference between "religious viewpoint" and "religious worship," it rejected the distinction.

As the Seventh Circuit appropriately noted, the unintelligible nature of the University's distinction is easily illustrated by example. The panel wondered if the University would lodge the same objections to funding an RSO "comprising members of the Society of Friends. Quakers view communal silence as religious devotion, and discussion leading to consensus as a religious exercise. Adherents to Islam and Buddhism deny that there is any divide between religion and daily life; they see elements of worship in everything a person does." App. 11a. The difference between "religious worship" and religious viewpoints is merely the mode of speech employed to communicate the religious viewpoint. Any other distinction lacks intelligible content and lies beyond the University's ability to administer without entangling itself in religion. *See Widmar*, 454 U.S. at 269 n.6.

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[6] In *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993), this Court held that a school committed viewpoint discrimination by preventing a church from using its facilities to show a Christian parenting film.

Petitioners claim *Good News Club*, *Rosenberger*, and *Lamb's Chapel* reserved for consideration the question of whether the government must permit a religious group's worship or evangelism in a public forum. Pet. 13-14 & n.10. However, neither the holdings of those cases nor the quotations extracted by Petitioners support that conclusion, especially in light of the clear holding of *Widmar*. As the quotes in the Petition indicate, this Court concluded that the parties did not raise whether the First Amendment protects "mere religious worship" in a public forum. Nor does this case involve "mere religious worship," as each of Badger Catholic's activities have other purposes as their main venture—leadership training, counseling, education—but include prayer, worship, and evangelistic speech as modes of expression during the activities.

Finally, Petitioners argue a difference exists between religious worship and speech from a religious perspective because Congress recognizes such a difference in federal law. However, the federal statutes cited by Petitioners do not involve speech fora. Petitioners claim this is "unimportant," yet fail to articulate a reason why. Pet. 36. In fact, the lack of a government speech forum in each statute is dispositive. When the government creates a program and funds private actors to advance that program, the Speech Clause does not impose the same restrictions on the government as when it opens a forum for private expression. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991). But the Petition "does not raise the issue" of the "state-

controlled University's right to use its own funds to advance a particular message." *Southworth*, 529 U.S. at 229. When the government is speaking, on its own accord or through others, the Establishment Clause binds its actions. *Summum*, 129 S. Ct. at 1131-32. But the Establishment Clause does not impose comparable restrictions upon private speech as the University has done here. *Rosenberger*, 515 U.S. at 841.

As the Seventh Circuit noted, the University convinced this Court in *Southworth* that students are not entitled to a refund of the mandatory student fee because the University will allocate it on a viewpoint neutral basis to foster a broad spectrum of private student speech in its forum. App. 2a. The University now asks this Court to approve its desire to renege on its viewpoint neutral promise and exclude religious speech. App. 3a. The court of appeals properly rejected that request.

II. There Is No Conflict Among the Circuits Warranting Certiorari.

Petitioners contend the decision below created a circuit split between the Seventh Circuit on one hand and the Second and Ninth Circuits on the other. Pet. 19. However, the Seventh Circuit's decision is consistent with other circuits that have confronted the issue of private religious speech in public fora. By contrast, the Second Circuit has yet to conclude its examination of the issue, and the Ninth Circuit's decision is an outlier, which ultimately, when on remand, did not preclude the worship at issue.

A. The Seventh Circuit's Decision Is Consistent with its Sister Circuits.

The Seventh Circuit's decision comfortably fits with the decisions from the First, Third, Fourth, Fifth, Eighth, and Tenth Circuits that the government violates the First Amendment when it excludes private religious expression, including worship and proselytizing, from fora opened generally for private expression. All of those courts have rejected the argument that the Establishment Clause requires the government to exclude private religious expression from such fora.

In *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45, 47 (1st Cir. 1991), the First Circuit, including then-Chief Judge Breyer, held that a school district created a designated public forum when it opened its buildings for meetings by youth groups, community, civic, and service organizations, government agencies, educational programs, and cultural events, and struck down its exclusion of a church that applied to use the facilities for a free Christmas meal that included prayer and religious preaching.

In *Gregoire v. Centennial School District*, 907 F.2d 1366, 1373 (3d Cir. 1990), the Third Circuit held that a school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by an illusionist.

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), the Fourth Circuit declared unconstitutional a school district's policy that required churches conducting worship services to pay more than nonreligious groups to rent school buildings for their expression.

In *Concerned Women for America v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989), the Fifth Circuit held that a public library violated the First Amendment by excluding a woman's prayer group from meeting in the library's auditorium based on a policy that excluded religious expression from an otherwise generally open designated public forum.

Prior to reaching this Court, the Eighth Circuit in *Widmar*, 635 F.2d 1310, ruled that the University of Missouri violated the First Amendment by excluding the Cornerstone student organization from meeting in its generally open facilities for the purpose of religious worship.

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), the Tenth Circuit ruled that the City of Albuquerque violated the First Amendment with its policy excluding religious worship and sectarian instruction from the forum it created at its senior centers, and by denying a local church access to the centers to show a film that proselytized people to convert to the Christian faith.

The Seventh Circuit's decision follows not only the decisions of this Court, but also those of its sister circuits, all of which have held that the government violates the First Amendment when it excludes

otherwise eligible speakers from a forum because they want to use religious modes of expression. The Seventh Circuit's decision does not create a circuit split; rather, it fits quite comfortably among its peers in declaring the University's policy unconstitutional. Therefore, this Court should deny the petition to review this case.

B. The Second Circuit's Controlling Decision in *Bronx Household of Faith II* Supports the Seventh Circuit's Decision Below.

As Petitioners admit, the Second Circuit's decisions in *Bronx Household of Faith v. Board of Education of the City of New York* have resulted in three rulings with "fractured" reasoning. Pet. 15. *See Bronx Household of Faith v. Cmty. Sch. Dist. No. 10* ("*Bronx Household I*"), 127 F.3d 207 (2d Cir. 1997) (affirming dismissal of plaintiff's complaint); *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* ("*Bronx Household II*"), 331 F.3d 342 (2d Cir. 2003) (affirming preliminary injunction against policy excluding "religious worship and religious instruction" from public school facility forum); *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.* ("*Bronx Household III*"), 492 F.3d 89 (2d Cir. 2007) (per curiam) (vacating permanent injunction and remanding due to a change in policy). A fourth decision is forthcoming. *See Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, No. 07-5291 (2d Cir., argued Oct. 6, 2009).

The *Bronx Household* cases involve a school district that denied a church's request to rent space

for Sunday morning meetings pursuant to a policy prohibiting "religious services or religious instruction." 331 F.3d at 346-47. The church's meetings include singing Christian hymns and songs, prayer, fellowship, Biblical preaching and teaching, and communion, among other things. *Id.* at 347.

Petitioners wrongly rely on a concurrence from Judge Calabresi in *Bronx Household III*, which was a per curiam decision "without a rationale to which a majority of the court agrees."[7] 492 F.3d at 91. However, *Bronx Household II* is the currently controlling decision, not the concurring opinion from *Bronx Household III* that the University cites.

The Second Circuit's decision in *Bronx Household II*, which the University ignores, supports the Seventh Circuit's decision in this case. In *Bronx Household II*, the Second Circuit likened the case to *Good News Club* and affirmed a preliminary injunction against the school policy. 331 F.3d at 354, 356. Because the school opened its facilities for groups to teach morals and character development, its exclusion of the church constituted viewpoint discrimination. *Id.* The court found that *Good News Club* "seriously undermined" the idea that a distinction can be made between religious worship

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[7] While Judge Calabresi's concurrence expresses the opinion that religious worship may be distinct from religious speech, none of the other judges on the panel endorsed that opinion. Moreover, this Court has rejected the distinction between religious speech and worship offered by Judge Calabresi. *See Widmar*, 454 U.S. at 271 n.9.

and other forms of speech from a religious viewpoint. *Id.* at 355.

Petitioners' reliance on *Bronx Household III* for the proposition that the circuits disagree on this issue is not only misguided due to its lack of a unified decision, but is also completely undermined because the case is yet unresolved. As it now stands, the Seventh Circuit's decision is in agreement with the controlling decision of *Bronx Household II*.

C. The Ninth Circuit's *Faith Center* Decision Is an Outlier.

The Ninth Circuit's decision in *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007), does not warrant review either. *Faith Center*'s holding is contrary to the precedent of this Court and the courts of appeals, and was only a ruling on a preliminary injunction that did not ultimately prevent the religious speaker from prevailing in the end. On remand, the District Court in *Faith Center* ruled that the public library had violated the First Amendment by excluding a worship service from its forum for private expression.

In *Faith Center*, a church applied to use the county's library meeting rooms for discussion of cultural and community issues from a religious perspective, as well as prayer and worship. *Id.* at 903. The Ninth Circuit held that a county library's policy of excluding "religious services" from its meeting rooms was a reasonable and permissible content-based restriction in a limited public forum

that did not violate the First Amendment. *Id.* at 911. The court reasoned that many of Faith Center's activities were permitted in the forum because other groups conducted similar activities, but Faith Center's meeting for "pure religious worship" was not permitted because of the limited character of the forum and because religious worship does not communicate a viewpoint.[8] *Id.* at 916.

However, on remand, the District Court declared unconstitutional the policy excluding the church's worship service. The District Court permanently enjoined the library's policy because it entangled the government excessively with religion in violation of the Establishment Clause. *Faith Ctr. Church Evangelistic Ministries v. Glover*, No. C 04-03111, 2009 WL 1765974, *8 (N.D. Cal. June 19, 2009). The University in this case engages in the same sort of excessive entanglement with its minute examination of each component of every Badger Catholic activity to determine whether they contain University-forbidden "worship," "prayer," or "proselytizing," or permitted "religious speech." The University excessively entangles itself with religion in the same way that the District Court in *Faith Center* found that the public library did.

The Ninth Circuit's conclusion that religious worship does not communicate a viewpoint is not

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[8] The Ninth Circuit found that the library could not exclude Faith Center's proselytizing speech, as that was similar to advocacy of other groups. *Id.* at 918. Similarly, the Seventh Circuit held the University may not exclude Badger Catholic's proselytizing because other RSOs advocate ideas with SUF money.

only illogical, but contrary to *Good News Club* and *Widmar*. As previously discussed, religious worship receives the same amount of protection under the First Amendment as other modes of religious expression. *See Good News Club*, 533 U.S. at 109-10; *Widmar*, 454 U.S. at 269 n.6. Religious worship, prayer, or proselytizing are merely modes of speech that communicate an idea or viewpoint. This Court has not differentiated between the communication of religious viewpoints and prayer, worship, and proselytizing.

Faith Center is also an outlier among courts of appeals that have examined government restrictions on religious expression in a public forum. First, the Ninth Circuit acknowledged that the "unique factual circumstances" of the library forum "set this case apart from the cases primarily relied upon by Faith Center." *Faith Ctr.*, 480 F.3d at 916 (citing, e.g., *Good News Club*, 533 U.S. at 103, and *Bronx Household II*, 331 F.3d at 345). The speech forum in *Faith Center* excluded most speech topics and only allowed use of the library for limited purposes. Petitioners argue they "attempt[ed] to draw the same line permitted" in that case, Pet. 15, but this is demonstrably false. The University's forum includes virtually every topic of speech. *Southworth*, 529 U.S. at 232.

The University excludes only religious expression conveyed in the modes of speech known as prayer, worship, and proselytizing. Students can advocate, as WISPIRG does, just not for religious ideas (proselytizing). Students can praise nature or cultural figures with words and celebration, as

Wunk Seek does, but not if that praise is directed toward a Western concept of God (worship). And students can counsel each other, but not if that counseling includes asking God for guidance (prayer). The Seventh Circuit's decision involves a completely different forum than *Faith Center* and correctly followed the precedent of this Court and its sister courts of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

DAVID G. WALSH *et al.*,
Petitioners,

v.

BADGER CATHOLIC, INC., formerly known as Roman Catholic Foundation, UW-MADISON, INC. *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

Respondents argue that this Court has definitively resolved whether a government must provide access to a limited public forum for religious worship, proselytizing, or inculcation of a particular religious belief. Resp. Br. at 1. That argument flies in the face of this Court's express reservation of the issue and the circuit split that even Respondents concede exists.

Respondents do not contend that the issue is unimportant, nor could they. As the Petition and supporting brief of Amici[1] demonstrate, federal funding decisions as well as the funding decisions of public universities across the Nation presume that religious worship is categorically different than other types of subsidized speech—a difference supported by the text and structure of the First Amendment.

The Court should grant the Petition to at last resolve this question of national importance.

ARGUMENT

I. The Petition Presents An Issue Of National Importance That Has Divided Federal Circuit Courts.

A. This Court Has Carefully And Consistently Reserved The Question Presented For Later Determination.

Respondents contend that the Question Presented has long ago been "resolved." Resp. Br.

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[1] Brief for *Amici Curiae* American Council on Education and Six Other higher Education Organizations in Support of Petitioners ("Amici").

at 1. However, as set forth in the Petition (Pet. at 15-19), a careful review of this Court's limited public fora proves otherwise.

Respondents first rely on this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), in which this Court held that a university could not single out religious organizations for discriminatory treatment in denying access to the university's facilities. *See, e.g.*, Resp. Br. at 17-18. *Widmar*'s analysis is inapposite, as it applied a strict scrutiny level of review that is inapplicable to this Court's current limited public fora jurisprudence. Pet. at 16-17; *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2987 (2010) (explaining and distinguishing *Widmar* on similar basis).

In short, Respondents are at a loss to explain why this Court has gone out of its way to note that it was preserving the issue for another day if, in fact, the issue was already resolved by this Court in *Widmar*. *See, e.g., Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 387-88 n.2 (1993); *see also* Pet. at 15-19.

Respondents also suggest, citing in part Justice Souter's dissenting opinion, that in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), this Court upheld the "use of the school facilities for prayer, worship, proselytizing and religious instruction" and thus rejected any distinction between speech from a "religious viewpoint" and "religious worship." Resp. Br. at 30. Respondents fail to note that while the *Good News Club* majority agreed that Justice Souter's recitation of the activities was accurate, it expressly rejected Justice Souter's characterization of the activities as constituting "worship." 533 U.S. 98, 112 n.4 (2001); *see also Bronx Household of Faith v.*

Bd. of Educ., 331 F.3d 342, 353 (2d Cir. 2003) ("*Bronx Household II*") (observing that the *Good News* Club majority "explicitly rejected [Justice Souter's] characterization of the Club's activities as an 'evangelical service of worship'"). If Respondents were correct, then the *Good News Club* majority's footnote four would have been unnecessary, for even activities that solely amounted to "mere religious worship" would be entitled to access the forum. *Id.*

This Court's careful delineation between speech from a religious viewpoint and core religious activities such as religious worship has not gone unnoticed by federal courts. *See, e.g., Campbell v. St. Tammany Parish Sch. Bd.*, No. 98-2605, 2003 WL 21783317, at *8 (E.D. La. July 30, 2003) ("The Supreme Court has not held that a religious service or religious worship may not be excluded from a limited forum"). Indeed, the lack of a clear ruling from this Court on this subject of doubt led Judge Walker to explicitly call for this Court to resolve this issue in his dissent. *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 132 (2d Cir. 2007) ("*Bronx Household III*"); *see also* Pet. at 28-29 (citing legal commentators to the same effect).

B. As Respondents Concede, Federal Circuit Courts Are Divided Over The Question Presented.

Respondents cannot seriously dispute that there is a circuit split and confusion in the lower courts. They attempt to marginalize the Ninth Circuit's decision in *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 915 (9th Cir. 2007), by

referring to it as an "outlier."[2] Resp. Br. at 33, 38. However, the Ninth Circuit's recognition that "[r]eligious worship . . . is not a viewpoint but a category of discussion within which many different religious perspectives abound," *id.* at 915, was shared by the Second Circuit in *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207, 215 (2d Cir. 1997) ("*Bronx Household I*") (observing that "[t]he distinction between [discussion of secular matters from a religious viewpoint] on the one hand, and religious services and instruction on the other, is not difficult for school authorities to make" and concluding that this distinction is "viewpoint neutral"). Judge Calabresi reached the same conclusion in *Bronx Household III*, 492 F.3d at 98 ("I conclude that the barring of worship services from defendants' school facilities is a content-based

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[2] Respondents also attempt to discredit the Ninth Circuit's decision in *Faith Center* by stating that on remand "the District Court declared unconstitutional the policy excluding the church's worship service." Resp. Br. at 39. On remand, the District Court recognized that the public library's policy of prohibiting the use of library meeting rooms for conducting religious worship services was a viewpoint neutral restriction. *Faith Center Church Evangelistic Church v. Glover*, No. C-04-03111 JSW, 2009 WL 1765974, at *7 (N.D. Cal. June 19, 2009). The District Court held, however, that the library's policy violated the Establishment Clause—rather than the Free Exercise Clause or the Equal Protection Clause—by excessively entangling the library in the church's affairs by requiring library staff to make the ultimate determination as to whether a proposed use of the meeting room constituted religious worship services. *Id.* at *9. Here, the University relied on, and deferred to, Respondents' own identification as programs primarily constituting religious worship or proselytizing activities. *See infra* Part II.A.

restriction and does not constitute viewpoint discrimination"),[3] as did the Fifth Circuit in *Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir.), *reh'g denied*, 231 F.3d 937 (5th Cir. 2000), *GVR'd*, 533 U.S. 913 (2001), *on remand*, 300 F.3d 526 (5th Cir. 2002), *on remand*, 2003 WL 21783317 (E.D. La. July 30, 2003) ("The District has excluded [religious services] but does not forbid speakers on general topics with a religious perspective—a distinction that viewpoint neutrality permits").

The court of appeals decisions discussed in the Petition (Pet. at 20-28) and by amici (Amici Br. at 15-20), and even Respondents discussions of these cases, highlight the uncertainty and lack of uniformity in the courts below. Guidance from this Court is therefore necessary.

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[3] Respondents contend that in light of the divergent opinions in *Bronx Household III*, which led to a per curium decision without a majority rationale, the Second Circuit's decision in *Bronx Household II* currently controls. Resp. Br. at 37. The Second Circuit in *Bronx Household II*, however, expressly declined to revisit its holding in *Bronx Household I* that a "permissible distinction may be drawn between religious worship and other forms of speech from a religious viewpoint," deeming this question unnecessary to reach in order to resolve the issue before the court. 331 F.3d at 355; *see also* Pet. at 24-25 (noting even Judge Walker in his *Bronx Household III* dissent recognized a distinction between religious worship and other forms of speech).

II. This Case Presents An Ideal Opportunity For This Court To Address The Question Presented.

A. The Activities Unquestionably Consist Of Religious Worship.

Respondents inaccurately claim that "University officials refused to release SUF funds for any activities that involved *what the University* determined to be student-led prayer, worship, 'proselytizing,' or the inculcation of values." Resp. Br. at 8 (emphasis added). The summary judgment record is uncontroverted: The identification as to which programs, if any, primarily involved religious worship or proselytizing was made by the students *alone*. App. 24a. The University relied on those identifications. App. 24a. The District Court had no difficulty concluding "the undisputed facts are sufficient to demonstrate that [Respondents'] activities included substantial prayer and worship components." App. 90a-91a.[4]

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[4] The University thus avoids excessive entanglement issues. The Ninth and Tenth Circuits have held that reliance on a church's self-identification can avoid excessive entanglement in distinguishing between religious worship and speech from a religious perspective. *See Faith Center*, 480 F.3d at 918 & n.18; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008); *see also Campbell v. St. Tammany Parish Sch. Bd.*, 300 F.3d 526, 529 (5th Cir. 2002) (Gibson, J., concurring) (observing that in contrast to *Rosenberger*, *Lambs' Chapel*, and *Good News Club*, the "facts before us involve no need for the school officials to impose their own characterization on the applicant's proposed use").

B. Resolution Of The Question Presented Will Provide Important Guidance To Universities Throughout The Country.

The University has adopted its funding policy to ensure that its segregated fees support a diversity of views consistent with the State's constitutional mandate.[5] As *Locke v. Davey*, 540 U.S. 712 (2004), shows, the First Amendment does not require otherwise.[6] *See generally Colorado Christian*, 534 F.3d at 1254.

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[5] Respondents mistakenly claim that Petitioners failed to invoke the Wisconsin Constitution's prohibition against sectarian funding in the district court. Resp. Br. at 26 n.4. In fact, Respondents have consistently pointed to the University's antiestablishment concerns under both the federal and state constitutions. *See* Def.'s Br. in Opp. to Pl.'s Mot. for Summ. J. at 12, W.D. Wis. No. 3:07-cv-00505 (filed May 30, 2008) (Dkt #136) ("Most relevant for the issues of this case, the provision of the Wisconsin Constitution . . . states, in relevant part: 'no sectarian instruction shall be allowed in such university'"); Opening Br. at 2, 7th Cir. No. 09-1102 (filed Apr. 27, 2009) (quoting same).

[6] Respondents attempt to discredit *Locke's* application to the Question Presented by claiming that *Locke* was limited "to the specific facts of the case." Courts have recognized that *Locke* has broader application. *See, e.g., Colorado Christian*, 534 F.3d at 1254 ("we are disinclined to think that *Locke* is confined to its facts"); *Eulitt v. Dep't of Educ.*, 386 F.3d 344, 354, 355 (1st Cir. 2004) (observing that *Locke* "confirms that the Free Exercise Clause's protection of religious beliefs and practices from direct government encroachment does not translate into an affirmative requirement that public entities fund religious activity simply because they choose to fund the secular equivalents of such activity" and rejecting attempt to "cabin [*Locke*] and restrict its teachings to the context of funding instruction for those training to enter religious ministries"); *see also Bush v. Holmes*, 886 So.2d 340, 344 (Fla Dist. Ct. App. 2004) (holding, based in part on *Locke*, that Florida constitution's no-aid provision did not

In promoting important extracurricular activities, which this Court has recognized can be an important part of a university's educational mission, *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000), the University has drawn a distinction between religious worship and other types of speech. As Amici have noted, numerous other post-secondary schools across the country have adopted similar distinctions in providing funding for limited public fora. Amici Br. at 10-11. Numerous federal statutes and executive branch orders and rulings have likewise drawn the same distinction. Pet. at 34-36; Amici Br. at 12-15. Whether this distinction is Constitutionally permissible is consequently of national interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

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violate Free Exercise Clause), *aff'd in part*, 919 So.2d 392 (Fla. 2006).

Respectfully submitted,

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IN THE

Supreme Court of the United States

DAVID G. WALSH, ET AL.,

Petitioners,

v.

BADGER CATHOLIC, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND SIX OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF PETITIONERS

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American Association of Community Colleges

American Association of State Colleges and Universities

American Dental Education Association

Association of American Universities

Association of Public and Land-grant Universities

NASPA—Student Affairs Administrators in Higher Education

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STATEMENT OF INTEREST[1]

The American Council on Education, The American Association of Community Colleges, The American Association of State Colleges and Universities, The American Dental Education Association, The Association of American Universities, The Association of Public and Land-grant Universities, and NASPA—Student Affairs Administrators in Higher Education submit this brief as *amici curiae* in support of petitioners and the grant of certiorari.

Founded in 1918, The American Council on Education (ACE) is the nation's unifying voice for higher education. Its more than 1,800 members include a substantial majority of colleges and universities in the United States. ACE represents all sectors of American higher education—public and private, large and small, denominational and nondenominational. It serves as a consensus leader on key issues and seeks to influence public policy through advocacy, research, and program initiatives.

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges at the national level. The AACC works closely with directors of state offices to inform and affect state policy. Founded in 1920, the AACC represents nearly 1,200 two-year,

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[1] Counsel for *amici* certify that no part of this brief was authored by counsel for any party, and no person or entity other than *amici* or their members made a monetary contribution to the preparation or submission of the brief. Counsel of record for the parties received timely notice of *amici*'s intent to file the brief and gave consent. Copies of the consent letters have been filed with the Clerk.

associate degree-granting institutions and more than 11 million students.

The American Association of State Colleges and Universities (AASCU) represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, which is roughly 55 percent of the enrollment at all public four-year institutions.

The American Dental Education Association (ADEA) is the voice of dental education. Its members include all U.S. dental institutions and many allied and postdoctoral dental education programs, corporations, faculty, and students. The mission of ADEA is to lead the dental education community to address contemporary issues influencing education, research, and the delivery of oral health care for the health of the public. ADEA's activities encompass a wide range of research, advocacy, faculty development, meetings, and communications, including the Journal of Dental Education.

The Association of American Universities (AAU) is an organization of leading research universities devoted to maintaining a strong system of academic research and education. It consists of 60 U.S. universities and two Canadian universities, divided about evenly between public and private. AAU member universities are on the leading edge of innovation, scholarship, and problem-solving, contributing significant value to the nation's economy, security, and culture.

The Association of Public and Land-grant Universities (A·P·L·U) is an association of 186 public re-

search universities and 27 state university systems, including 74 land-grant institutions. Founded in 1887, and formerly known as the National Association of State Universities and Land-Grant Colleges, A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

NASPA—Student Affairs Administrators in Higher Education (NASPA) is the leading voice for student affairs administration, policy, and practice. With more than 11,000 members at 1,400 campuses in 29 countries, NASPA is the foremost professional association for student affairs administrators, faculty, and graduate and undergraduate students. NASPA members are committed to serving college students by embracing the core values of diversity, learning, integrity, collaboration, access, service, fellowship, and the spirit of inquiry

ACE and the other higher education organizations on this brief filed an *amici* brief in support of the respondent officials of the Hastings College of Law in *Christian Legal Society Chapter of University of California, Hastings College of Law* v. *Martinez*, 130 S. Ct. 2971 (2010), a case that also raised First Amendment issues relating to a Registered Student Organization program (RSO program).

STATEMENT

Like many colleges and universities across the country, the University of Wisconsin (the University) has a program under which funds derived from mandatory student activity fees are available to reimburse registered student organizations (RSOs) for the cost of approved extracurricular activities, including speech activities protected by the First Amendment. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217 (2000) (upholding the University's RSO program against a First Amendment challenge brought by students who objected to some of the speech funded by their activity fees).

Badger Catholic, Inc. is an RSO at the University, and most of its activities are reimbursed under the University's RSO program. *See* Pet. 6 (noting that the University approved 86% of Badger Catholic's funding request in 2007-2008). But the University refused to reimburse Badger Catholic to the extent that its activities constituted "worship, proselytizing, and religious instruction"—in other words, "speech that constitutes the practice of religion." Pet. App. 3a. The specific activities for which Badger Catholic sought, but the University denied, funding included:

- Summer training camps with scheduled Catholic masses;
- A mentoring program in which Catholic priests and nuns would offer guidance or prayer if requested by a student;
- A program under which Catholic nuns from Italy would spend the school year in Madison

and assist students in discerning whether they are called to the priesthood; and

- The distribution of Rosary booklets.

Pet. App. 91a-94a.

There is no dispute that the activities at issue do, in fact, constitute "worship, proselytizing, and religious instruction"—for that is how Badger Catholic itself classifies them. *See* Pet. App. 24a (the University "asks the student groups to self-identify those activities that are worship, proselytizing, and prayer and then it only declines to fund such activities").

SUMMARY OF ARGUMENT

Whether a public university must fund the religious worship, instruction, and proselytization of its RSOs is a very important question confronting American higher education following the decision below. Extracurricular programs, including RSO programs, are an important part of the educational process. Among its other benefits, involvement in RSOs gives students the opportunity to discuss issues and express viewpoints on matters of concern. But a university is not required to fund all manner of student speech. An RSO program is a limited public forum, and a university may limit access to such a forum to those student groups and student activities that further the university's educational mission, so long as the access limitations are reasonable and viewpoint neutral. In *amici*'s view, the First Amendment permits, but does not require, a university to fund religious worship, instruction, and proselytization under an RSO program.

The University of Wisconsin has drawn a line between, one the one hand, religions worship, instruction, and proselytization and, on the other hand, speech about religion or speech from a religious perspective. This line is also embedded in federal law, including in numerous Acts of Congress, in an Executive Order issued by President George W. Bush concerning the constitutional rights of faith-based organizations, and in regulations promulgated by the Department of Education and other agencies.

Several federal circuit courts—including the Second Circuit, Fifth Circuit, Ninth Circuit, and Tenth Circuit—have confronted the question presented and reached different conclusions.

The Seventh Circuit misread and misapplied this Court's precedents. This Court's cases do not compel the conclusion that the University must fund the religious worship, instruction, and proselytization activities of Badger Catholic.

ARGUMENT

I. WHETHER PUBLIC UNIVERSITIES MUST FUND RELIGIOUS WORSHIP, INSTRUCTION, AND PROSELYTIZATION BY REGISTERED STUDENT ORGANIZATIONS IS AN ISSUE OF GREAT IMPORTANCE TO HIGHER EDUCATION.

The question presented in this case is whether the First Amendment requires a public university to fund religious worship, instruction, and proselytization by RSOs seeking funding for such activities. This is an extremely important issue facing hun-

dreds of public institutions of higher education in the wake of the Seventh Circuit's decision.

A primary mission of American colleges and universities is, of course, the education of their student bodies. And "extracurricular programs are, today, essential parts of the educational process." *Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 130 S. Ct. 2971, 2989 (2010). Indeed, educators and institutions long "have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it. Students may be shaped as profoundly by their peers as by their teachers." *Id.* at 2999 (Kennedy, J., concurring).

The opportunity to participate in student groups is an important component of extracurricular learning. *See id.* at 2989 ("involvement in student groups is 'a significant contributor to the breadth and quality of the educational experience' ") (quoting *Board of Ed. of Indep. School Dist. No. 92 of Pottawatomie County* v. *Earls*, 536 U.S. 822, 831 n.4 (2002)). Programs that support and encourage the formation of RSOs "facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self." *Id.* at 2999 (Kennedy, J., concurring). As this Court observed in the context the University of Wisconsin's RSO program, a university "may determine that its mission is well served if students have the means to engage in dynamic discussion of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Southworth*, 529 U.S. at 233.

Many RSOs are formed in order to promote on-campus discussion of particular subjects or to allow students collectively to express a specific viewpoint. And is settled law that "the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints." *Christian Legal Society*, 130 S. Ct. 2978.

But the First Amendment does not require a university to support student speech of every sort under its RSO program. This Court has recognized that an RSO program is a limited public forum. *See id.* at 2984 n.12. And a "defining characteristic of limited public forums" is that the forum creator may "reserve them for certain groups." *Id.* at 2985 (brackets and quotation marks omitted). Thus, a university may restrict access to its RSO forum so long as its restrictions are both "reasonable and viewpoint neutral." *Id.* at 2984. It need not fund all expressive activities covered by the First Amendment. Flag burning is to some degree a protected activity; so is nude dancing. But a university need not fund a flag burning club or a nude dancing society if doing so would not advance the purposes of its RSO program or its educational mission, so long as the denial of recognition or funding is not based on the viewpoint of the would-be RSOs.

In designing an RSO program, a university has latitude in deciding what student groups and what speech activities will be supported and funded in order to further the institution's educational mission. It may "confine a speech forum to the limited and legitimate public purposes for which it was created." *Id.* at 2986 (brackets and quotation marks omitted).

See id. at 2989 n.17 ("a university has the authority to set the boundaries of a limited public forum"). Deciding "what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators." *Id.* at 2989 n.16. *See also Southworth*, 529 U.S. at 235 (noting the "discretion universities possess in deciding matters relating to their educational mission").

A wide variety of student groups have applied for and obtained RSO status at the University of Wisconsin. In *Southworth*, this Court observed that RSOs at the University "included the Future Financial Gurus of America; the International Socialist Organization; the College Democrats; the College Republicans; and the American Civil Liberties Union Campus Chapter." 529 U.S. at 223. "As one would expect, the expressive activities undertaken by RSOs are diverse in range and content, from displaying posters and circulating newspapers throughout the campus, to hosting campus debates and guest speakers, and to what can best be described as political lobbying." *Id.*

The University also strongly supports speech by religious RSOs. Badger Catholic is one such organization, and the University in past years has funded most of its activities. The University has drawn a line, however, when it comes to the actual practice of religion. In its pedagogical judgment, it decided that religious worship and proselytization differed from speech about religion or speech coming from a religious viewpoint.

The University of Wisconsin is not alone in this regard. Many other public universities have drawn the same line or a similar line. For example:

"Organizations will not be provided funding to support religious worship or religious proselytizing." Virginia Polytechnic Institute and State University, *Student Activity Fee Allocation Policies & Procedures for the Student Budget Board & Registered Student Organization Budget Board* 8 (Oct. 2007);

"Funds will not be provided to student organizations for activities to pay for materials that in any way: * * * 2. financially support lobbying activities or religious worship services." Old Dominion University, *Student Organization Handbook* 16 (2010-2011);

"Activities typically funded through the SBA [Student Bar Association]/Student Assembly include: * * * 9. Peer and Public Education Activities, to support the promotion of knowledge and information on subjects that are not politically partisan or involve religious worship or devotional activities." William & Mary Law School, *Registered Student Organization Handbook* 14 (2009-2010)) (footnote omitted).

"Items that will not be funded * * * 15. Any religious ceremony or worship service, except when such activity is for educational purposes." Pennsylvania State University, UPAC Handbook 6 (July 27, 2010);

"University funds cannot be used to provide *direct* support of religious activities, worship or proselytizing." University of Michigan-Flint, *Student Involvement Handbook* 57 (2010) (emphasis in original);

> "Proselytizing is expressly prohibited at any ASCSU [Associated Students of Colorado State University] funded program * * *." Colorado State University, *The Source: Registered Student Organizations Resource Guide* 33 (2009-2010).[2]

In contrast, at least some public institutions do fund the religious worship and instruction activities of their RSOs. *See* University of Washington Tacoma, *Registered Student Organization Handbook* 16 (2010-2011) ("SAB-CEF [Student Activities Board-Campus Event Fund] funds can be used to support the activities and events of a religious or spiritual registered student organization, including activities and events that involve religious worship, exercise, and instruction."). This is a choice that colleges and universities should be allowed to make in the exercise of their educational judgment and academic freedom.

Amici believe that the Constitution permits, but does not require, public institutions to fund religious worship, instruction, and proselytization as part of an RSO program. *Cf. Locke* v. *Davey*, 540 U.S. 712 (2004) (discussed *infra* at 22-23). Colleges and universities should be free to decide whether funding the practice of religion by a student group supports their pedagogical mission and the purposes of their

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[2] The same source also provides (at pg. 35): "It is expressly prohibited to use funds for any activities prohibited by Federal or State law, including, but not limited to, the following: * * * b. The Constitution of Colorado, Article IX, Section 7, prohibits the expenditure of State funds for any sectarian purpose. An activity with a sectarian purpose would include, for example, the activities of worship, devotion, prayer, meditation, or a religious service."

RSO program. Under the decision below, a university with an RSO program like the one at the University of Wisconsin will be required to fund worship and proselytization by student groups—at least if that university sits within the Seventh Circuit. Many administrators of universities outside the Seventh Circuit face the choice between changing their RSO programs or inviting lawsuits by student groups.

Notably, Badger Catholic sought to collect money damages from the University of Wisconsin administrators that it sued. The District Court and the Seventh Circuit held that University officials were entitled to qualified immunity because the law was not clear at the time Badger Catholic filed suit. *See* Pet. App. 13a, 64a-66a. But, as the District Court warned, "in future cases University officials will not be entitled to qualified immunity, and so an injured student will be able to obtain monetary relief." Pet. App. 101a. This Court should grant the petition and resolve the question presented so that university administrators will know whether they are constitutionally required to fund the practice of religion by recognized student groups.

II. FEDERAL LAW DRAWS THE SAME LINE DRAWN BY THE UNIVERSITY OF WISCONSIN.

The line drawn by the University in the context of its RSO program between religious worship, instruction, and proselytization, on the one hand, and other speech activities (including speech about religion or speech from a religious perspective), on the other hand, is a line that has been drawn in federal law by the President, the Congress, and federal agencies.

In 2002, the President George W. Bush issued an Executive Order addressing the constitutional rights of religious organizations that participate in certain programs funded by the federal government. *See Equal Protection of the Laws for Faith-Based and Community Organizations*, Exec. Order No. 13279, 67 Fed. Reg. 77141 (2002). This presidential directive declared that such religious organizations are entitled to express their views so long as federal funds are not used for "inherently religious activities"—*i.e.*, religious worship, instruction, and proselytization. The Order provides that a "faith-based organization that applies for or participates in a social service program supported with Federal financial assistance" may "continue to carry out its mission," including the "expression of its religious beliefs, provided that it does not use direct Federal financial assistance to support any inherently religious activities, *such as worship, religious instruction, or proselytization.*" *Id.* § 3(f) (emphasis added). The *Faith-Based* Order expressly finds that this funding restriction is "[c]onsistent with the Free Exercise Clause and the Free Speech Clause of the Constitution." *Id.* The Department of Justice has adopted regulations closely tracking the language of Executive Order 13279. *See* 28 C.F.R. § 38.1(c) (religious organizations participating in DOJ-funded programs or services may not use direct financial assistance from DOJ "to support any inherently religious activities, such as worship, religious instruction, or proselytization").

Similarly, Department of Education (ED) regulations provide that an organization that receives a grant under an ED program, or a subgrant from a State under a State-administered ED program, may

not use its grant or subgrant to pay for "[r]eligious worship, instruction, or proselytization." 34 C.F.R. § 75.532(a)(1); *id.* § 76.532(a)(1). *See also* 69 Fed. Reg. 31708, 31712 (2004) ("Organizations that receive direct Department funds may not use these funds for inherently religious activities."). ED has explained that these conditions on the use of federal funds do not infringe religious liberty:

> The restrictions on the use of grants and subgrants for inherently religious activities do not prohibit faith-based organizations from engaging in inherently religious activities. The restrictions only prohibit such funds from being used to support these activities. * * * Faith-based organizations, like other private organizations, must use the Federal funds for the purpose of the applicable program. [68 Fed. Reg. 56418, 56419 (2003).]

Likewise, numerous Acts of Congress dealing with the funding of education deny funding for religious worship, instruction, or proselytization. *See, e.g.*, 20 U.S.C. § 7885 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter [to private schools] for religious worship or instruction."); *see also* Pet. 35 n.23 (listing similar federal statutes); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 885 n.9 (1995) (Souter, J., dissenting) (observing that "Congress * * * routinely excludes religious activities from general funding programs.") (citing, *inter alia*, 20 U.S.C. § 1062(b), 20 U.S.C. § 1069c, 20 U.S.C. § 1132c-3(c), 20 U.S.C. § 1132i(c), and 20 U.S.C. § 1213d)).

In sum, the line drawn by the University in its RSO funding program is identical to the line drawn

by the Executive Branch and Congress. RSOs at the University may receive University funds and express their views, but such funds may not be used for worship, proselytization, or religious instruction, which are inherently religious activities. This is a line that the President, DOJ, and ED have found to be constitutional in the context of federal funding programs. Absent review by this Court, the Seventh Circuit's decision will jeopardize the federal statutes and regulations that draw this same line. *See infra* at 19-20 (discussing the nullification of the line drawn in the Older Americans Act by the Tenth Circuit in *Church of the Rock* v. *City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996)).

III. THE FEDERAL CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED.

The Petition for Certiorari identifies federal appellate decisions from the Second Circuit and Ninth Circuit that conflict with the decision below. *See* Pet. 20-26 (discussing *Faith Center Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891 (9th Cir. 2007), and *Bronx Household of Faith* v. *Board of Ed. of City of N.Y.*, 492 F.3d 89 (2d Cir. 2007)). This inter-circuit conflict provides a powerful reason for this Court to grant review in this case. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals and state courts * * *."). Three other circuit court cases further demonstrate the conflict and confusion in the lower courts over the issue presented for review.

a. In 2000, the Fifth Circuit upheld a school dis-

trict policy that permitted outside groups to use school facilities to discuss religious material, but did not permit such groups to engage in religious worship or religious instruction in those facilities. *See Campbell* v. *St. Tammany's School Bd.*, 206 F.3d 482 (5th Cir.), *reh'g denied*, 231 F.3d 937 (5th Cir. 2000), *GVR'd*, 533 U.S. 913 (2001), *on remand*, 300 F.3d 526 (5th Cir. 2002), *on remand*, 2003 WL 21783317 (E.D. La. July 30, 2003). *Campbell* involved a Louisiana school district's building use policy, which permitted after hours use of school facilities for civic, recreational, or entertainment purposes, but not for (1) partisan political activities, (2) for-profit fundraising, or (3) "religious services or religious instruction." 206 F.3d at 484. Although the policy did not allow religious services or instruction within school facilities, it expressly permitted the use of facilities for the purpose of "discussing religious material or material which contains a religious viewpoint." 231 F.3d at 943. Thus, much like the University's approach here, the Louisiana school district policy permitted within its forum speech about religion and speech from a religious perspective, but did not permit the actual practice of religion within the forum.

The school district denied the plaintiffs' request to use school facilities for a "prayer meeting" at which the they planned to "worship the Lord in prayer and music" and "engage in religious and Biblical instruction." 206 F.3d at 485. The plaintiffs brought a First Amendment challenge to the school district's policy, but the Fifth Circuit upheld the policy. The court held that the school district had created a "limited public forum." 231 F.3d at 941. It also held that the policy was viewpoint neutral, explaining that the policy excludes "religious activities but does not

forbid speakers on general topics with a religious perspective—a distinction that viewpoint neutrality permits." 206 F.3d at 487. "The policy's express tolerance of discussion from a religious viewpoint rebuts any inference of viewpoint discrimination." 231 F.3d at 943.

Although the decision of the Fifth Circuit panel was unanimous, the *Campbell* case sharply divided the court as a whole. Five Fifth Circuit judges dissented from the denial of rehearing en banc. The plaintiffs in *Campbell* filed a petition for certiorari, and this Court granted the writ, vacated the judgment, and remanded for reconsideration in light of *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). The Fifth Circuit in turn remanded to the District Court. In a concurring opinion, one of the panel members expressed the view that there was a "significant" difference between *Campbell* and *Good News Club*. 300 F.3d at 528 (Gibson, J., concurring). Specifically, in *Good News Club* the decision to deny access to the forum to a religious speaker was "based on the applicant's *viewpoint*, rather than the subject matter presented." *Id.* (emphasis in original).

On remand, the District Court struggled mightily. It found that *Campbell* was not controlled by this Court's decisions in *Good News Club*, *Rosenberger*, and *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). *See* 2003 WL 21783317, at *8 n.12 ("The prior cases are distinguishable"). It recognized that "[t]he Supreme Court has not held that a religious service or religious worship may not be excluded from a limited forum." *Id.* at *8. Nevertheless, relying on what it called "the cryptic *in dicta* fourth footnote of *Good News*," the

District Court ruled for the plaintiffs on the ground that "Campbell proposed what *primarily* was a religious service—a 'prayer meeting,' however, it was not *merely* a religious service. The proposed meeting included a discussion of family and political issues, from a legally protected religious viewpoint." *Id.* at *9 (emphases in original). The court so held while recognizing that it "is difficult to imagine any religious service, no matter how sectarian or nontraditional" that is "merely" a religious service. *Id.* The District Court's decision on remand was not appealed to the Fifth Circuit.[3]

b. In *Full Gospel Tabernacle* v. *Community School District 27*, 164 F.3d 829 (2d Cir. 1999), *affirming* 878 F. Supp. 214 (S.D.N.Y. 1997), a church and its pastor sought access to after school hours to a New York public school to conduct religious worship services. The Board of Education denied the requested access based on state law and Board policy prohibiting the use of school facilities for such purposes. The District Court and the Second Circuit rejected the plaintiffs' First Amendment challenge. The District Court concluded that the school facilities were a "limited public forum," 878 F. Supp. at 220, and that "the exclusion of religious worship services is reasonable in light of the purposes served by the forum and viewpoint neutral," *id.* at 224 (citing *Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997)). The Second Circuit affirmed "substantially for the rea-

[3] Although the Fifth Circuit's judgment was vacated to allow that court to consider *Good News Club*, the Fifth Circuit opinions, the en banc vote, and the proceedings on remand vividly illustrate how the question presented has divided the federal judiciary.

sons" articulated by the District Court. 164 F.3d at 830. Thus, the decision below conflicts with the Second Circuit's decision in *Full Gospel Tabernacle* as well as that court's decision in *Bronx Household of Faith*.

c. The inter-circuit split also includes the Tenth Circuit's decision in *Church of the Rock* v. *City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), which aligns with the decision below. In *Church of the Rock*, a church pastor sought to use a Senior Center owned and operated by the City of Albuquerque "to show a two-hour film entitled *Jesus*. The film recounts the life of Jesus Christ as described in the Gospel of Luke." 84 F.3d at 1277. At the end of the film, the narrator "invites viewers to adopt the Christian religion and to join him in a short prayer." *Id.* The pastor also sought permission "to give away giant-print New Testaments to persons attending the film." *Id.* City policy permitted groups to use Senior Centers "for classes and other activities if the subject matter is 'of interest to senior citizens.'" *Id.* The pastor's request, however, was denied on the ground that "City policy prohibited the use of Senior Centers 'for sectarian instruction or as a place for religious worship.'" *Id.*

After classifying the Senior Center as a "designated public forum," 84 F.3d at 1278, the Tenth Circuit held that the City's policy was "a viewpoint-based restriction on speech" in violation of the First Amendment. *Id.* at 1279. The Tenth Circuit stated that "the City had already opened the doors of its Senior Centers to presentations about religion, such as The Bible as Literature and Myths and Stories About the Millennium" and therefore the City had to

allow the showing of a film "advocating the adoption of the Christian faith." *Id.* The Tenth Circuit also held that, "even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination" because, in the court's view, "[a]ny prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint." *Id.*

The Tenth Circuit rejected the City's argument that its policy was necessary to comply with a federal statute, the Older Americans Act, "which requires as a condition for receiving federal funding assurances that a 'facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship.'" 84 F.3d at 1280 (quoting 42 U.S.C. § 3027(a)(14)(A)(iv)). Although the Tenth Circuit recognized that the City's policy "mirrors the language of the Older Americans Act," it ruled that "compliance with the Older Americans Act does not justify this viewpoint-based restriction on expression." *Id.* Thus, the court held unconstitutional the line drawn by Congress between "sectarian instruction" and "religious worship" versus other expressive activities.

IV. THE SEVENTH CIRCUIT MISREAD THIS COURT'S PRECEDENTS.

The key precedents of this Court that the Seventh Circuit consulted do not compel the Circuit's conclusion that the University must fund Badger Catholic's religious worship, instruction, and proselytization.

The Seventh Circuit primarily relied upon *Widmar* v. *Vincent*, 454 U.S. 263 (1981). *See* Pet. App. 4a-5a. In *Widmar*, this Court held that the First Amend-

ment required the University of Missouri at Kansas City (UMKC) to allow a registered religious student group called Cornerstone to use classroom space and the student center for its meetings, which included such "religious worship" activities as "prayer, hymns, Bible commentary, and discussion of religious views and experiences." 454 U.S. at 265 & n.2. The *Widmar* Court found that UMKC had "created a forum generally open for use by students," *id.* at 267, and, accordingly, applied strict scrutiny. *See id.* at 269-270. But this Court's jurisprudence in this area has developed in the 20 years since *Widmar* was decided, and the law is now clear that an RSO program is a limited public forum and is not subject to strict scrutiny. Instead, a university may place reasonable, viewpoint-neutral conditions on access to an RSO forum. *See, e.g., Christian Legal Society*, 130 S. Ct. at 2984.

The Seventh Circuit also relied upon *Rosenberger*, *see* Pet. App. 5a-6a, but that case did not involve the same sort of activities for which Badger Catholic seeks funding. The student group in *Rosenberger*, Wide Awake Productions, sought funding for a student newspaper that presented a Christian perspective on matters of interest to University of Virginia (UVA) students. *See* 515 U.S. at 826. Wide Awake Productions was not considered a "religious organization" under UVA guidelines, which defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.* UVA denied funding for the newspaper because of its religious viewpoint —that it "promoted or manifested a particular belief in or about a deity or an ultimate reality" (*id.* at 827, brackets omitted)—not because it constituted the practice of

religion. As the District Court recognized in *Badger*, "*Rosenberger* is distinguishable because it involved university funding of a much narrower range of student activities" than "the wide-ranging and highly sectarian funding requests at issue in the present case." Pet. App. 89a, 95a.

The Seventh Circuit discussed, but did not follow, *Locke* v. *Davey*, 540 U.S. 712 (2004). *See* Pet. App. 8a-9a. In *Locke*, this Court upheld a scholarship program enacted by the State of Washington for postsecondary education that barred recipients from using the scholarship to pursue a degree in devotional theology. This Court rejected a Free Exercise Clause challenge to the theology exclusion. The Court also held that the Establishment Clause did not compel the exclusion. Thus, the State could, but was not required to, extend the scholarship program to theology degrees. *See* 540 U.S. at 719 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

The Seventh Circuit rejected the University's argument "that it has made the sort of choice that Locke approved." Pet. App. 9a. The Circuit said that the scholarship program in Locke "did not evince hostility to religion," *id.*, implying that the University's decisions do evince such hostility. But the University is not hostile toward Badger Catholic's religion: the University has registered Badger Catholic as an RSO and funds most of its activities. "The University generally approved [Badger Catholic]'s 2007-08 budget," and funds many of Badger Catholic's activities, "including large and small group discussions, educational and service offerings, thea-

ter and choral activities, and student orientation and welcoming activities." Pet. App. 36a, 37a. The University has simply "drawn a line between religious speech and religious expression amounting to worship, proselytizing and sectarian instruction." *Id.* at 1132. The District Court, notably, did not believe that the University had discriminated against Badger Catholic's viewpoint. "In fact, the University funds a considerable amount of [Badger Catholic]'s religious speech, which shows that the University is not attempting to exclude religious viewpoints from its forum" *Id.* at 57a. "Plaintiffs have identified no topic on which the University has excluded religious viewpoints." *Id.* at 56a. *See also id.* at 96a n.6 ("the University did not discriminate against [Badger Catholic] because [Badger Catholic] intended to present a Catholic or religious viewpoint").

The Seventh Circuit also distinguished *Locke* on the ground that that case involved "selective funding as a permissible public choice, versus selective funding as impermissible restriction on private choice in a public forum." Pet. App. 10a. The Seventh Circuit said that *Badger Catholic* involved the latter situation, and that "a university cannot shape Badger Catholic's message by selectively funding the speech it approves, but not the speech it disapproves. *Id.* But the Seventh Circuit seems not to have appreciated the fact that a university may limit its RSO forum to speech that advances the purposes for which the forum was created, so long as any restrictions are reasonable in light of those purposes and are viewpoint-neutral. *See Christian Legal Society*, 130 S. Ct. at 2984. "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserv-

ing it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. Furthermore, universities are entitled to some deference in these matters: "determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrations and educators." *Christian Legal Society*, 130 S. Ct. at 2889 n.16. The Seventh Circuit gave no deference to the University on this score.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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